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ENFORCEABILITY OF COVENANTS NOT TO COMPETE IN MISSISSIPPI
Louis H. Watson, Jr.

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ENFORCEABILITY OF COVENANTS NOT TO COMPETE IN MISSISSIPPI

*Louis H. Watson, Jr.**

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*If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie sown under his own folly*¹

I. INTRODUCTION

Practitioners often find themselves presented with the difficult task of determining whether a particular covenant not to compete is enforceable. The practitioner's client may be an employer seeking to enforce the covenant against a departing employee to protect the employer's business interests, or the practitioner's client may be an employee seeking to free himself from the bondage of the covenant. Lay people have varying views on the subject ranging from "yes they are enforceable" to "they are not worth the paper they are written on."

This article is intended to serve as a practical guide to assist the practitioner in advising his clients as to the current state of the law in Mississippi regarding the enforceability of covenants not to compete; to point out particular problems associated with the enforcement of such covenants; and to suggest certain issues that may apply to the case at hand to either promote or avoid enforcement. With this information, the practitioner should be able to give affordable, effective and practical legal advice to his client. The practitioner should be cautioned that such advice should rarely consist of a definite "yes" or "no" determination, for the reasonableness and thus, enforceability of the covenant presented to the practitioner for evaluation, will be judged on the particular facts surrounding that particular covenant. There are currently many unanswered questions,

¹ Villers v. Beaumont, 1 Vern. 101, 101, 23 Eng. Rep. 342, 342 (Ch. 1682) (Lord Nottingham, Lord Chancellor of England).

and the finder of fact is given wide latitude in determining enforceability. As we shall see later, courts ultimately judge such covenants on a case-by-case basis, and the facts vary tremendously, depending on the circumstances.²

II. HISTORY OF COVENANTS NOT TO COMPETE IN MISSISSIPPI

Reported decisions tell us that restrictive covenants have been utilized in Mississippi since the mid 1800's. Most all of the early decisions involve the contractual sale of a business with a restrictive covenant contained in the contract prohibiting the seller from competing against the buyer for a certain number of years. It was not until the 1937 case of *Wilson v. Gamble*³ that the Mississippi Supreme Court addressed the validity of a covenant not to compete in the traditional employer/employee context.⁴ In *Wilson*, the court upheld a five-year restriction that prevented a physician from "practic[ing] his profession in the City of Greenville, Washington County, Mississippi, or within five miles of the corporate limits of the City of Greenville."⁵ This case answered in the affirmative the question of whether covenants not to compete were enforceable in the traditional employment setting.⁶ *Wilson* also set specific rules and guidelines which have served as the foundation for our courts' recent decisions.

A. Main Purpose

Employers utilize covenants not to compete as an effective legal means of protecting their company's varied business interests, which include their investment of time and expense in

² *Donahoe v. Tatum*, 134 So. 2d 442, 445 (Miss. 1961); see *Herring Gas Co. v. Magee*, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993) (discussing enforceability of covenants not to compete), *aff'd*, 22 F.3d 603 (5th Cir. 1994); *Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1043 (Miss. 1982) (discussing factual analysis of covenants not to compete); *Texas Rd. Boring Co. v. Parker*, 194 So. 2d 885, 889 (Miss. 1967) (discussing covenants not to compete).

³ 177 So. 363 (Miss. 1937).

⁴ *Wilson*, 177 So. at 365.

⁵ *Id.*

⁶ *Id.*

training employees. Those interests may also include such things as protection of a specific customer base, protection of the employer's good will, and protection of its existing relationship with its customers.⁷ One of the most valuable attributes of an executed covenant between an employer and an employee is that the employer can use the covenant not to compete as a psychological weapon against an employee threatening to leave his employment. An employer can rely upon a properly drafted and otherwise valid covenant as a legal means to prevent an employee from leaving and joining or establishing a competing business or enterprise. Cases where an employer failed to obtain such a covenant from his employee point out the definite advantages of having each employee sign a covenant not to compete.⁸

B. No Express Statutory Prohibition

The Mississippi Supreme Court has long held that these types of restrictive covenants are not violative of the antitrust provisions of our state constitution and statutes.⁹ At the time of publication, the Mississippi Legislature has yet to enact any statute which would prohibit or limit the use of covenants not

⁷ See, e.g., *Donahoe v. Tatum*, 134 So. 2d 442, 443 (Miss. 1961) (stating "[T]he purpose of the contract was to protect his [personnel] agency in its business, because it was a personal and confidential type of operation, with trade secrets and confidential relations with large employers and applicants for jobs.")

⁸ See *ACI Chemicals, Inc. v. Metaplex, Inc.*, 615 So. 2d 1192, 1195 (Miss. 1993) (stating, "In the case at hand, [their employees] refused to sign a non-competition agreement. Thus, they could compete with [their employer] as long as they did not use any trade secrets belonging to [their employer]."); *Planhouse, Inc. v. Breland & Farmer Designers, Inc.*, 412 So. 2d 1164, 1165 (Miss. 1982) (discussing situation where residential plan designer who did not sign non-compete agreement established his own business in competition with his prior employer); see generally, Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960) (addressing enforceability of covenants not to compete); Jeffrey G. Grody, Note, *Partial Enforcement of Post-Employment Restrictive Covenants*, 15 COLUM. J.L. & SOC. PROBS. 181 (1979) (discussing enforceability of restrictive covenant contracts with regards to employee resignations).

⁹ See *Jackson v. Price*, 105 So. 538, 539 (Miss. 1925) (citing MISS. CONST. art. 7, § 198 (1890)); *Cumberland Tel. & Tel. Co. v. State*, 54 So. 670, 676 (Miss. 1911).

to compete. As we well know, this does not prevent the Mississippi Legislature from taking it upon itself to enact such legislation, for "[n]o man's life, liberty, or property are safe while the Legislature is in session."¹⁰ Other nearby jurisdictions, such as Louisiana, have enacted statutes restricting the use of such covenants.¹¹

III. COURT-MANDATED REQUIREMENTS

Generally speaking, there are three factors a court will consider in determining whether a covenant not to compete is enforceable: (1) the rights of the employer; (2) the rights of the employee; and (3) the rights of the public.¹² It is the court's role to:

maintain a reasonable balance in this area. This "requires us to recognize that there is such a thing as unfair competition by an ex-employee as well as by unreasonable oppression by an employer." The circumstances of each case will be carefully scrutinized to determine whether it falls within or without the boundary of enforceability.¹³

A. *Employer's Interest and Necessity*

As stated earlier, employers' interests vary depending upon the particular industry or trade in which the employer is involved. An employer's relevant interests may include:

- Protection of customer base;
- Protection of good will;
- Ability to succeed in a competitive market;

¹⁰ Estate of A.B., 1 Tucker 247, 249 (N.Y. Surr. 1866).

¹¹ See LA. REV. STAT. ANN. § 23:921 (West Supp. 1995) (limiting such covenants to two-year period).

¹² Herring Gas Co. v. Magee, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993), *aff'd*, 22 F.3d 603 (5th Cir. 1994); Empiregas, Inc. v. Bain, 599 So. 2d 971, 975 (Miss. 1992); Thames v. Davis & Goulet Ins., Inc., 420 So. 2d 1041, 1043 (Miss. 1982); Texas Rd. Boring Co. v. Parker, 194 So. 2d 885, 888 (Miss. 1967).

¹³ Donahoe v. Tatum, 134 So. 2d 442, 445 (Miss. 1961) (quoting ARTHUR LINTON CORBIN, CORBIN, CONTRACTS § 1394 (1951); 5 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS §§ 1659, 1660 (Rev. ed. 1937)).

- Time and expense of training;
- Customer's reliance on employee's skill/training;
- Protection of trade secrets; and
- Protection of confidential and proprietary business information.

In *Empiregas, Inc. v. Bain*,¹⁴ the Mississippi Supreme Court recognized that an employer "has an interest in protecting its customer base, its good will and its ability to succeed in a competitive market."¹⁵

In upholding the restrictive covenant in *Taylor v. Cordis Corp.*,¹⁶ the United States District Court for the Southern District of Mississippi recognized the extensive training that the employer had given a pacemaker salesman, examined the time and expense associated with the training, and considered the customers' reliance on the special skills of the salesmen.¹⁷ Thus, it is incumbent on the employer to introduce evidence of these interests in order to justify the need for the restrictive covenant. Failure to do so is fatal.¹⁸

¹⁴ 599 So. 2d 971 (Miss. 1992).

¹⁵ *Empiregas, Inc.*, 599 So. 2d at 976.

¹⁶ 634 F. Supp. 1242 (S.D. Miss. 1986).

¹⁷ *Taylor*, 634 F. Supp. at 1243-46. The salesmen even assisted during operations in which the doctors implanted the pacemakers. *Id.* at 1246; see also *Herring Gas Co. v. Magee*, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993) (stating, "The primary right of the employer is that of 'protecting the business from loss of customers by the activities of the former employees who have peculiar knowledge of the relationships with the employer's customers.'" (quoting *Redd Pest Control Co.*, 157 So. 2d at 136); *Texas Rd. Boring Co. v. Parker*, 194 So. 2d 885, 889 (Miss. 1967) (holding covenant was necessary for protection of business and good will of employer which "was largely dependent upon the contractor, customer relationship as is the competing business of [departing employee]"); *Donahoe v. Tatum*, 134 So. 2d 442, 443 (Miss. 1961) (stating, "[P]urpose of the contract was to protect his agency in its business, because it was a personal and confidential type of operation, with trade secrets and confidential relations with large employers and applicants for jobs.").

¹⁸ See *Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1042 (Miss. 1982) (reversing enforcement of covenant by employer who "offered no proof of its economic need for the post-employment restraint imposed by the contract, or its reasonableness, or any circumstances or background to the execution of the contract supporting such restraint"); *Sivley v. Cramer*, 61 So. 653, 654 (Miss. 1913) (holding seller of business failed to show restrictive covenant was necessary to protect good will of business sold).

B. Protection of Employer's Trade Secrets

Probably one of the most fiercely guarded and sensitive areas in the employer/employee relationship is the need for protection of the employer's trade secrets. This subject is beyond the scope of this paper; however, there are several important points that need to be addressed.

Not until 1991 did the Mississippi Legislature enact the Mississippi Uniform Trade Secrets Act which governs the protection of trade secrets.¹⁹ That legislation now attempts to define for us what constitutes a trade secret²⁰ and provides special equitable remedies for misappropriation of such trade secrets.²¹ However, the Act does state that the parties may choose to protect their respective rights through the use of a private contract.²² Thus, the practitioner must be careful in drafting a covenant not to compete not to strip away the protection afforded either party by the Mississippi Uniform Trade Secrets Act.²³

¹⁹ MISS. CODE ANN. §§ 75-26-1 to 75-26-19 (1991).

²⁰ Perhaps the most difficult question is "what constitutes a protectable trade secret?" See *Lear Siegler, Inc. v. Ark-Ell Springs, Inc.*, 569 F.2d 286, 288 (5th Cir. 1978) ("The term 'trade secret' is one of the most elusive and difficult concepts in the law to define."); *Cataphote Corp. v. Hudson*, 422 F.2d 1290, 1293-94 (5th Cir. 1970) (discussing what constitutes trade secret under Mississippi law); *ACI Chemicals, Inc. v. Metaplex, Inc.*, 615 So. 2d 1192, 1196 n.1 (Miss. 1993) (noting that although not applicable in present case, definition of trade secret is now codified at MISS. CODE ANN. § 75-26-3(d) (1991)); *Planhouse, Inc. v. Breland & Farmer Designers, Inc.*, 412 So. 2d 1164, 1167 (Miss. 1982) (discussing duration of injunction prohibiting use of trade secrets, noting that "[e]ven where trade secrets have been wrongfully used by former employees, the majority rule, and one which courts generally apply, is the former employer is entitled to injunctive relief for no longer period than it would take the former employee to secure the same information or same position by independent means, and without resort to the trade secret") (citations omitted); *Bagwell v. H.B. Wellborn & Co.*, 156 So. 2d 739, 741 (Miss. 1963) (enforcing non-compete agreement even though chancellor sided with employer by denying admission of book into evidence, which contained fourteen years of confidential business information).

²¹ MISS. CODE ANN. § 75-26-5 (1991).

²² MISS. CODE ANN. § 75-26-15(2)(a) (1991).

²³ See *Lear Siegler, Inc.*, 569 F.2d at 289 (stating distinction that "an agreement not to disclose information, unlike the covenant not to compete, cannot be challenged as an unreasonable restraint of trade").

C. Employee's Interest

The employee's interest in maintaining a livelihood is one of the three main factors considered by the court. Proof of the employee's prior skill and knowledge of the particular industry should be carefully considered. What if the employee is trained for no other occupation and will be unable to sustain a living for himself and his family? The employee should introduce evidence of his prior training and experience in the field. The employee should also demonstrate the extent of the hardship that enforcement of the covenant will place upon him and the effect it will have on his family.

In *Herring Gas Co. v. Magee*,²⁴ the United States District for the Southern District of Mississippi identified the primary interest of a departing employee as "that of avoiding undue hardship and protecting their ability to make a living."²⁵

In *Empiregas, Inc.*, the Mississippi Supreme Court noted that "the restraint sought to be imposed is one which restricts the exercise of a gainful occupation"²⁶ Accordingly, the court will consider the interests of the employee and ultimately integrate them in its balancing test.

D. Public's Interest

The Mississippi Supreme Court has not yet focused on the rights of the public in any of its prior decisions. However, the court has noted that the rights of the public must not be adversely affected and that there must not be any danger of a monopoly for the employer. Thus, a party to litigation should introduce evidence of either an adverse impact on the public's interest or no adverse impact depending upon the facts of the case.²⁷

²⁴ 813 F. Supp. 1239, 1245 (S.D. Miss. 1993).

²⁵ *Herring Gas Co.*, 813 F. Supp. at 1245 (citing *Donahoe*, 134 So. 2d at 444; *Texas Rd. Boring*, 194 So. 2d at 888).

²⁶ *Empiregas, Inc.*, 599 So. 2d at 976 (quoting *Arthur Murray Dance Studios v. Witter*, 105 N.E.2d 685, 693 (Cuyahoga County Ct. C.P. Ohio 1952)).

²⁷ See *Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1043 (Miss. 1982) (stating court must look to rights of public); *Texas Rd. Boring v. Parker*,

E. Nature of Employment or Trade

Virtually all employers should be able to justify the use of covenants not to compete in their particular trade or industry. Although there are few reported decisions upon which to rely as a guide, otherwise valid covenants not to compete should be upheld in virtually all industries and professions. For example, in *Frierson v. Sheppard Building Supply*,²⁸ the Mississippi Supreme Court rejected the departing employee's contention that the building supply industry "was not of such nature as to be susceptible of being protected by a covenant not to compete" because the evidence showed that the departing employee "took from appellee, within a short time after opening Frierson Building Supply Company, numerous employees and considerable business."²⁹

F. "Blue Pencil" Rule

The Mississippi Supreme Court first applied the "blue pencil" rule in *Redd Pest Control Co. v. Heatherly*³⁰ by reforming the geographic scope of the covenant.³¹ Although the supreme court pointed out that Heatherly had no experience in the pest control industry prior to his employment with Redd, it held that it would be unreasonable to restrict him from competing on a state-wide basis since he possessed no information that would make his competition unfair outside of the Tupelo

194 So. 2d 885, 888 (Miss. 1967) (ruling courts must look to rights of public in considering non-competition agreements); *Donahoe v. Tatum*, 134 So. 2d 442, 444 (Miss. 1961) (finding contract did not create monopoly in personnel business in that there were seven other agencies in area); *Wilson v. Gamble*, 177 So. 363, 366 (Miss. 1937) (finding no monopoly created and citizens had ample supply of medical care).

²⁸ 154 So. 2d 151 (Miss. 1963).

²⁹ *Frierson*, 154 So. 2d at 155.

³⁰ 157 So. 2d 133 (Miss. 1963).

³¹ *Redd Pest Control Co.*, 157 So. 2d at 133. The employer pest control company sought to enjoin a former employee from competition within the entire State of Mississippi for a period of two years following termination. *Id.* The employee had signed the covenant not to compete two years prior to his termination under threat of discharge. *Id.* at 134.

area.³² For the first time, the court utilized the "blue pencil" rule to modify the geographic scope of the covenant and enjoined Heatherly from competing with Redd within a fifty-mile radius of the City of Tupelo.³³ Since *Redd Pest Control Co.*, courts have utilized the "blue pencil" rule to modify "unreasonable" terms of covenants not to compete.³⁴

G. Geographic Scope of Covenant

The geographic scope of the covenant must be tailored to the specific needs and customer base of the employer in order for it to be deemed reasonable. Of course the "reasonableness" of the geographic scope will depend upon the specific facts of each case. By looking at prior determinations of the Mississippi Supreme Court, one can compare what the court has deemed "reasonable" versus what it has deemed "unreasonable."

There are different methods of defining the "geographic scope" of a covenant not to compete. For instance, a list of customers can be substituted for a specific territorial definition; a set distance from a location may be utilized; or a statewide, county-wide or city-wide restriction may be used.

³² *Id.* at 135.

³³ *Id.* Specifically, the court held:

The second question raised by appellant is whether an agreement restricting competition which is reasonable as to part of the territory described in the agreement but unreasonable as to the rest should be enforced as to the reasonable part. We hold that the agreement should be enforced as to the reasonable part of the area

Redd Pest Control Co., 157 So. 2d at 135.

³⁴ See *Hensley v. E.R. Carpenter Co.*, 633 F.2d 1106, 1110 (5th Cir. 1980) (stating, "Under Mississippi Law, when the territorial scope of a covenant not to compete is unreasonable, the covenant may nevertheless be enforced within an area that is reasonable."); *Taylor v. Cordis Corp.*, 634 F. Supp. 1242, 1249 (S.D. Miss. 1986) (stating, "[T]he court may reform the scope of the agreement to cover a reasonable area wherein [employer] can prove the economic justification for its restraint, and excise any area wherein the restraint is not supported by economic justification and is therefore unreasonable.").

1. *Restriction Within a Certain Geographic Radius*

Most covenants not to compete prohibit an employee from competing against the employer within a certain mile radius of his place of employment.³⁵ However, the employer bears the initial burden of demonstrating that this geographic restriction is reasonable.³⁶ In *Parker v. Lewis Grocer Co.*,³⁷ the Mississippi Supreme Court held that courts may look at the "reasonable expectation of expansion" when analyzing the geographic scope of restrictive covenants.³⁸ Specifically, the court stated:

As to the coverage or applicability of restrictive covenants in the nature of ancillary restraints, the same are tested or viewed not only as present but *in futuro* for the term of the covenants. Thus it is, that when a court is faced with determining whether or not such covenant is a reasonable or unreasonable restraint of trade, the territorial scope may include reasonable expectation of expansion.³⁹

³⁵ See, e.g., *Empiregas, Inc. v. Bain*, 599 So. 2d 971, 973 (Miss. 1992) (rejecting 50-mile radius for other reasons); *Texas Rd. Boring Co. v. Parker*, 194 So. 2d 885, 889 (Miss. 1967) (upholding 100-mile radius of "any city, town or village in the United States in which the employee had worked for the employer."); *Redd Pest Control Co. v. Heatherly*, 157 So. 2d 133 (Miss. 1963) (modifying statewide restriction to 50-mile radius of Tupelo); *Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151, 156 (Miss. 1963) (upholding 50-mile radius); *Wilson v. Gamble*, 177 So. 363, 368 (Miss. 1937) (upholding five-mile radius).

³⁶ *Redd Pest Control Co. v. Heatherly*, 157 So. 2d 133, 135-36 (Miss. 1963). See *Hensley v. E.R. Carpenter Co.*, 633 F.2d 1106, 1108 (5th Cir. 1980) (modifying covenant whose geographic scope consisted of "the continental United States and Canada" for employee of urethane foam manufacturer to 300-mile radius of City of Tupelo).

³⁷ 153 So. 2d 261 (Miss. 1963).

³⁸ *Parker*, 153 So. 2d at 270.

³⁹ *Id.*; see *Prame v. Ferrell*, 166 F. 702, 704 (6th Cir. 1909) (finding contract valid that restricted competition throughout entire United States), *cert. denied*, 215 U.S. 605 (1909); *Hood v. Legg*, 128 S.E. 891, 891 (Ga. 1925) (noting that consideration of extension of business was reasonable in contract interpretation); *Wilson v. Gamble*, 177 So. 363, 365 (Miss. 1937) (noting restrictive covenants were valid unless they effectively caused monopoly); *C.W. Single & Co. v. Reynolds*, 1 N.W.2d 307, 310 (Neb. 1941) (recognizing restrictive employment covenant was reasonable because it was limited in reasonable manner); *Schultz v. Johnson*, 160 A. 379, 381 (N.J. Err. & App. 1932) (finding that only restricting related business was reasonable).

2. State Wide Restriction

Assuming that an employer is able to justify its interest and necessity in enforcing an entire state-wide prohibition, a court will likely grant such restriction.⁴⁰ The Mississippi Supreme Court, in the past, has carefully scrutinized the employer's justification for the geographic restriction, focusing on the employer's interest and business necessity.⁴¹ The court has utilized the "blue pencil" rule to modify any geographic territory that appears to be overreaching.⁴²

For example, in *Redd Pest Control Co.*, the Mississippi Supreme Court addressed the issue of whether a statewide restriction was reasonable to enjoin a former employee of a pest control company.⁴³ The evidence showed that Redd Pest Control engaged in the pest control business throughout the entire state of Mississippi and had operations in each county.⁴⁴ The evidence also showed, however, that "Heatherly worked in Tupelo and within a radius of fifty miles thereof as service man for Redd and had regular and close contact with Redd's customers whom he serviced."⁴⁵

At the lower level, the chancellor had refused to issue an injunction enjoining the employee from competing.⁴⁶ The court agreed with the chancellor's determination that it would be unreasonable to restrict Heatherly from engaging in the pest control business throughout the entire State of Mississippi because he possessed no information that made his competition unfair outside of the Tupelo market.⁴⁷ The supreme court modified the geographic scope of the covenant not to com-

⁴⁰ See *Donahoe v. Tatum*, 134 So. 2d 442, 444-45 (Miss. 1961) (upholding county-wide restriction).

⁴¹ *Redd Pest Control Co. v. Heatherly*, 157 So. 2d 133, 133-34 (Miss. 1963).

⁴² *Redd Pest Control Co.*, 157 So. 2d at 133-34.

⁴³ *Id.*

⁴⁴ *Id.* at 134.

⁴⁵ *Id.* at 135.

⁴⁶ *Id.* at 133.

⁴⁷ *Redd Pest Control Co.*, 157 So. 2d at 133.

pete.⁴⁸ In doing so, the court noted:

Redd met the burden of proving that the contract is not unreasonable when applied to Tupelo and the area within fifty miles thereof within the State of Mississippi. There is no sound reason why the contract should not be enforced to the extent that it is reasonable since it protects a legitimate business interest.⁴⁹

Thus, depending upon the employer's ability to justify the need of a statewide restrictive covenant, the court will carefully scrutinize the agreement to determine whether such a restriction is reasonable.⁵⁰ If the provision is too broad or overreaching, the court can modify the restriction based on the evidence presented to the court.⁵¹

3. *Substitution of Customer List*

There are no reported decisions from the Mississippi Supreme Court upholding the use of a specific list of customers. However, the United States District Court for the Southern District of Mississippi took an *Erie*-bound guess and utilized such a restriction in *Taylor v. Cordis Corp.*⁵² In *Taylor*, the covenant of a pacemaker salesman did not contain a specific geographical territory or restriction.⁵³ The court, upholding the covenant based on existing Mississippi law,⁵⁴ utilized the "blue-pencil rule"⁵⁵ and prohibited the salesman from contacting a list of certain Mississippi physicians on whom he had called with his previous employer.⁵⁶

⁴⁸ *Id.* at 133-36.

⁴⁹ *Id.* at 136.

⁵⁰ *Id.* at 135-36.

⁵¹ *Id.* at 133-36.

⁵² 634 F. Supp. 1242 (S.D. Miss. 1982).

⁵³ *Taylor*, 634 F. Supp. at 1244.

⁵⁴ *Id.* at 1251.

⁵⁵ *Id.* at 1249 (citing *Hensley v. E.R. Carpenter Co.*, 633 F.2d 1106, 1110 (5th Cir. 1980); *Redd Pest Control Co. v. Heatherly*, 157 So. 2d 133, 135-36 (Miss. 1963)).

⁵⁶ *Taylor*, 634 F. Supp. at 1249-50.

H. Duration of Prohibition

The Mississippi Supreme Court has been fairly liberal with regard to the duration of restrictive covenants and has upheld such covenants for up to a five-year period.⁵⁷ Depending upon the duration sought by the employer, the facts of each case will determine whether the duration sought is reasonable. To justify the duration sought, the employer should introduce evidence of any and all facts supporting its position. Those include but are not limited to the amount of time and expense it has spent in training the departing employee; the amount of time it would take a novice in the industry to acquire the skill and training necessary to compete; and the amount of time and expense the employer will incur to replace the departing employee with a suitable replacement.⁵⁸

I. Defenses

1. "Unclean Hands"

*[A] man must come into a Court of Equity with clean hands*⁵⁹

⁵⁷ See *Donahoe v. Tatum*, 134 So. 2d 442, 445 (Miss. 1961) (upholding five-year period); *Wilson v. Gamble*, 177 So. 363, 368 (Miss. 1937) (allowing five-year restriction); see also *Herring Gas Co. v. Magee*, 813 F. Supp. 1239, 1246 (S.D. Miss. 1993) (upholding six-year period), *aff'd*, 22 F.3d 603 (5th Cir. 1994).

⁵⁸ See *Redd Pest Control Co. v. Heatherly*, 157 So. 2d 133, 134-35 (Miss. 1963) (upholding covenant for two-year period where departing employee had no experience prior to his employment by employer yet was furnished with information regarding "methods and means of controlling pests" which was obtained at considerable expense to employer); see also *Taylor v. Cordis Corp.*, 634 F. Supp. 1242, 1249 (S.D. Miss. 1986) (upholding one-year restriction where proof showed that it took employer over one year "to hire, train and place in the field a new sales representative"); *Texas Rd. Boring Co. v. Parker*, 194 So. 2d 885, 889-90 (Miss. 1967) (upholding two-year prohibition against road construction company manager); *Bagwell v. H.B. Wellborn & Co.*, 156 So. 2d 739, 741 (Miss. 1963) (upholding two-year prohibition against insurance adjuster); *Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151, 156 (Miss. 1963) (upholding two-year restrictive covenant against general manager of building supply business); *Donahoe*, 134 So. 2d at 442 (finding five-year restriction valid); *Wilson*, 177 So. at 368 (upholding five-year restrictive covenant against physician).

⁵⁹ *Dering v. Earl of Winchelsea*, 1 Cox Eq. 318, 319, 29 Eng. Rep. 1184, 1185

The 1992 case of *Empiregas, Inc. v. Bain*,⁶⁰ recognized the departing employee's defense of "unclean hands" to deny enforcement of his covenant not to compete.⁶¹ Bain worked for a propane gas distributorship and had signed a non-compete agreement, upon receiving a promotion, in which he agreed not to compete for a period of three years.⁶² The covenant further prohibited him from soliciting customers of Empiregas for a period of three years.⁶³ Specifically, the court stated that such covenants are enforceable when they are reasonable; "[h]owever, when the [c]hancellor finds that the employee's termination was arbitrary, capricious or in bad faith, he can 'lend the hand of equity' in refusing to enforce the agreement."⁶⁴

2. Implied Covenant of Good Faith and Fair Dealing

In 1859, the Mississippi Supreme Court first recognized the applicability of the implied covenant of good faith and fair dealing to restrictive covenants in *Townsend v. Hurst*.⁶⁵ In *Townsend*, the plaintiff had purchased the premises and stock of a physician who practiced in Carroll County, Mississippi.⁶⁶ The selling physician promised that he would deliver the stock

(Ch. 1787).

⁶⁰ 599 So. 2d 971 (Miss. 1992).

⁶¹ *Empiregas, Inc.*, 599 So. 2d at 974-77.

⁶² *Id.* at 976. The covenant restricted Bain from working within a fifty-mile radius of any location in which he had previously worked in the two years prior to his termination. *Id.* at 973.

⁶³ *Id.* Empiregas terminated Bain for alleged insubordination after a series of incidents involving a dispute with his supervisor because Bain left work a half-hour early "to put on dry clothes after spending the cold, wet January afternoon in two inches of mud under a new customer's house to repair pipes in order to facilitate conversion from electric heat to propane." *Id.*

⁶⁴ *Id.* at 975 (citing *Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151, 155 (Miss. 1963)); see *Frierson*, 154 So. 2d at 155 (rejecting departing employee's defense of unclean hands but found that if chancellor had found evidence of bad faith, contract may have been enforceable).

⁶⁵ 37 Miss. 679, 680-81 (1859).

⁶⁶ *Townsend*, 37 Miss. at 380-81.

and the good will of his business to the buyer.⁶⁷ The selling physician also represented that he would recommend the buyer to the local community as a physician and that, because of his bad health, he would move to Florida after the sale.⁶⁸ The plaintiff paid half of the purchase money when it became due in January of 1855, and the selling physician delivered possession to the plaintiff.⁶⁹ Then instead of moving to Florida, the selling physician "settled in one mile and a half of him, and continued to practice medicine in fraud of his contract and sale, and to the prejudice of [the] appellant."⁷⁰ The buyer sued to rescind the contract, and the Mississippi Supreme Court found in his favor, holding that:

[g]ood faith and justice require that parties making representations and holding out inducements intended to influence the action of those with whom they deal in matters of contract, and upon which they are expected to rely and do rely, shall be strictly held to make good such representations, and to fulfil the reasonable expectations thereby created. It is of the last importance that courts of equity should rigidly adhere to a rule so consonant with morality and common honesty.⁷¹

In *Taylor v. Cordis Corp.*,⁷² the court considered whether, as the employee alleged, the employer had breached "the implied duty of good faith and fair dealing."⁷³ The employee sought to have the covenant not to compete declared invalid and claimed that the employer failed to timely notify him of problems associated with its pacemakers.⁷⁴ The court recognized that:

[A] principal has a duty to deal fairly and in good faith with

⁶⁷ *Id.*

⁶⁸ *Id.* at 680-81.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Townsend*, 37 Miss. at 680-81. The court held that the selling physician's conduct of resuming his old practice violated good faith. *Id.* at 681.

⁷² 634 F. Supp. 1242 (S.D. Miss. 1986).

⁷³ *Taylor*, 634 F. Supp. at 1246.

⁷⁴ *Id.*

an agent and to provide the agent with any information which might subject the agent to physical or pecuniary loss in dealing with the product. The principal's good faith duty to the agent also demands that the principal must maintain a standard of conduct which will not harm the agent's business reputation or reasonable self-respect.⁷⁵

The court ultimately rejected the employee's defense of breach of the implied covenant of good faith and fair dealing and held that the employer's failure to inform the employee of all product problems before the issuance of public notifications did not entitle the employee to the equitable remedy of rescission of his non-compete agreement.⁷⁶

3. Lack of Mutuality

In *Wilson v. Gamble*,⁷⁷ the Mississippi Supreme Court considered the employee's defense of lack of mutuality where the agreement could only be terminated by the partnership.⁷⁸ In *Wilson*, two assistant physicians had signed covenants not to compete in 1929, agreeing not to compete with their employer upon separation for a five-year period within a five-mile radius of Greenville, Mississippi.⁷⁹ All parties continued to operate under those contracts until 1937 when a disagreement arose over 1936 profits.⁸⁰ Both of the younger physicians then left the employment of the partnership and entered into their own independent practice in the City of Greenville.⁸¹

The partnership sought a preliminary injunction to prohib-

⁷⁵ *Id.* (citations omitted); see *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493, 497 (8th Cir. 1955) (discussing principal's duty of good faith dealing).

⁷⁶ *Taylor*, 634 F. Supp. at 1247; see also *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993) (noting bad faith on employer's part negates restrictive covenant); *Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151, 155 (Miss. 1963) (finding that if there is evidence of bad faith, court should not enforce contract).

⁷⁷ 177 So. 363 (Miss. 1937).

⁷⁸ *Wilson*, 177 So. at 366.

⁷⁹ *Id.* at 365.

⁸⁰ *Id.*

⁸¹ *Id.*

it the departing physicians from competing.⁸² The defendants countered that the agreement was unenforceable for a lack of mutuality because it could only be terminated by the partnership.⁸³ In response, the court held:

[t]his objection to the enforceability of the contracts, if such there can be, disappears here for the reason that the appellants entered into the services of the appellees thereunder, and with the consent of the appellees continued therein for eight years; consequently, there is no inequity in holding the appellants to the performance of their promise not to engage in their profession within the territory and for the time specified.⁸⁴

The Mississippi Supreme Court has yet to set aside a covenant not to compete based upon the defense of lack of mutuality, and serious doubt exists as to if it ever will.

4. *Breach of Contract*

Breach of the express terms of the agreement containing the covenant not to compete by the employer provides for the defense of breach of contract by a departing employee. Whether this can serve to set aside the non-compete provision of the

⁸² *Id.*

⁸³ *Wilson*, 177 So. at 366.

⁸⁴ *Id.* The court stated that if the employer had defaulted, it may hold otherwise. *Id.*; see also *Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151, 154 (Miss. 1963) (rejecting departing employee's contention that lack of consideration was different than lack of mutuality). With regards to the distinction between lack of mutuality and lack of consideration, the *Frierson* court specifically stated that:

[i]n the *Gamble* case the employees argued that the contracts were unenforceable because they lacked mutuality in this: That they were terminable at the will of the employer. In the present case appellant argues, in substance, that the contract is unenforceable for lack of consideration in this: That appellee can terminate the contract at will. There is a difference between lack of mutuality of obligation and lack of consideration, depending upon how the term "mutuality" is used.

Frierson, 154 So. 2d at 154 (citations omitted).

The court went on to note, however, that only simple inquiries are needed to see if consideration has been given for exchanged promises. *Id.*

contract depends upon the facts of the case at hand.

In *Matheney v. McLain*,⁸⁵ the Mississippi Supreme Court affirmed the chancery court's decision to deny enforcement of a non-compete agreement based on the defense of breach of contract.⁸⁶ In *Matheney*, two employees departed from an appraisal business, and the employer sought to enforce a non-compete agreement.⁸⁷ The covenant prohibited the employees from competing within a two-hundred-mile radius of the City of Jackson, Mississippi, or within a one-hundred-mile radius of any branch office for a period of two years from the date of termination.⁸⁸ The departing employees, however, contended that the employer had breached the contract which contained the non-compete agreement by unilaterally reducing their compensation.⁸⁹ In recognizing this defense, the Mississippi Supreme Court held that the employer had breached the contract by reducing the employees' wages and therefore was not entitled to the injunctive relief it sought.⁹⁰

Thus, if the employer breaches a term of the agreement containing the covenant not to compete, the court should uphold the defense of breach of contract and refuse to enforce the non-compete provisions against a departing employee. The Mississippi Supreme Court has yet to address the issue of whether a covenant not to compete that is a part of a larger employment or partnership agreement is severable from the rest of the agreement. Therefore, one should consider whether to include a severability provision when drafting such an agreement so that the non-compete provision can be severed from the remainder of the agreement.

In *Hensley v. E.R. Carpenter Co.*,⁹¹ an employee brought a

⁸⁵ 161 So. 2d 516 (Miss. 1964).

⁸⁶ *Matheney*, 161 So. 2d at 517.

⁸⁷ *Id.*

⁸⁸ *Id.* at 518. The non-compete agreement also contained a liquidated damages provision for violation of the restrictive covenant. *Id.* The liability for breach was \$125 for each week the breach continued. *Id.*

⁸⁹ *Id.* at 519.

⁹⁰ *Id.* at 519-20.

⁹¹ 633 F.2d 1106 (5th Cir. 1980).

declaratory judgment action against his employer seeking to have a non-compete agreement declared unenforceable since he had been demoted.⁹² The employee signed an employment contract which contained a covenant not to compete which prohibited him from working for a competitor anywhere in the continental United States or Canada for a two-year period.⁹³ The company later demoted the employee from division manager to sales manager.⁹⁴ Although the company did not reduce the employee's salary, the employee received neither a yearly cost of living increase nor a year-end bonus which the company normally provided.⁹⁵ The district court determined that the employer had not breached a contract with the employee by demoting him because the employee's salary stayed the same, and because the employee was not asked to resign.⁹⁶ Further, the court noted that the contract allowed the employer to treat the employee in such a manner.⁹⁷ The employee appealed and the Fifth Circuit reversed and remanded, finding that the district court erred in finding that the employer had not breached the employment contract by demoting the employee.⁹⁸ The court remanded the case, however, to determine whether the employee committed a "vital" breach which would cause the employment contract to be unenforceable.⁹⁹

⁹² *Hensley*, 633 F.2d at 1107.

⁹³ *Id.* The employee worked for E.R. Carpenter which manufactured and processed urethane foam. *Id.* Hensley had served as the division manager of the company's Division Profit Center in Tupelo, Mississippi. *Id.*

⁹⁴ *Id.*

⁹⁵ *Hensley*, 633 F.2d at 1107.

⁹⁶ *Id.* at 1108.

⁹⁷ *Id.*

⁹⁸ *Id.* The court further noted that even had the employer breached the employment contract, the employee could only rescind the restrictive covenant if the breach was material. *Id.* at 1109-10. The court also stated that the materiality of a breach is usually left as a question of fact. *Hensley*, 633 F.2d at 1110; see *Gulf South Capital Corp. v. Brown*, 183 So. 2d 802, 804-05 (Miss. 1966) (noting that materiality of breach is decisive factor that determines whether other party is excused); see also *E.T. Burrowes Co. v. Crittenden*, 37 So. 504, 505 (Miss. 1904) (holding jury should have decided whether contract was substantially performed).

⁹⁹ *Hensley*, 633 F.2d at 1108-09.

5. *Lack of Consideration*

The Mississippi Supreme Court has consistently held that continued employment is sufficient to constitute consideration for covenants not to compete and that the defense of "lack of consideration" lacks merit.¹⁰⁰ However, the court has cautioned us that if an employee is fired shortly after signing such an agreement, it would "probably hold the agreement was not supported by consideration."¹⁰¹ To date, the court has yet to indicate how long this period of continued employment must be in order for it to serve as valid consideration for a covenant not to compete.

6. *Unreasonable Restraint of Trade*

The Mississippi Supreme Court has yet to set aside a covenant not to compete because it constitutes an unreasonable restraint of trade. For example, in *Donahoe v. Tatum*,¹⁰² the court rejected the employee's defense that a restrictive covenant would impose an unreasonable restraint of trade.¹⁰³ The employee had worked at a local personnel agency in Jackson, Mississippi.¹⁰⁴ The court ruled that the enforceability of restrictive covenants in employment contracts depends upon its "reasonableness."¹⁰⁵ Finding that there were seven other personnel agencies located in the city of Jackson, the court held that the restrictive covenant was not "an unreasonable restraint of trade so as to render it unenforceable."¹⁰⁶

Thus, a court will most likely take into consideration the

¹⁰⁰ *Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151, 154 (Miss. 1963) (citing *Wilson v. Gamble*, 177 So. 363 (Miss. 1937)); see also *Empiregas, Inc. v. Bain*, 599 So. 2d 971, 977 (Miss. 1992) (finding continued employment served as consideration).

¹⁰¹ *Frierson*, 154 So. 2d at 154.

¹⁰² 134 So. 2d 442 (Miss. 1961).

¹⁰³ *Donahoe*, 134 So. 2d at 444.

¹⁰⁴ *Id.* at 443.

¹⁰⁵ *Id.* at 444. The court noted that a time and territorial restriction should not impose an undue hardship on the former employee. *Id.* The court also stated that it would consider the conditions in the restricted territory. *Id.*

¹⁰⁶ *Donahoe*, 134 So. 2d at 444.

competitiveness of the local marketplace in considering a defense of unreasonable restraint of trade.

7. Duress

The Mississippi Supreme Court has not yet set aside a non-compete agreement based on the defense of duress. In *Redd Pest Control Co. v. Heatherly*,¹⁰⁷ the court specifically rejected an employee's contention that he signed the agreement under duress.¹⁰⁸ There, the court enforced the employee's covenant not to compete even though the employer had obtained his signature by instructing him that he would be discharged if he did not sign the covenant.¹⁰⁹ As a result, the issue of whether duress constitutes grounds for setting aside a contract containing a restrictive covenant remains unresolved.

IV. PROCEDURAL ASPECTS OF COVENANTS NOT TO COMPETE

Even assuming that a valid and enforceable covenant not to compete agreement exists, having a court enforce that agreement can be a time consuming and costly undertaking. Typically these cases arise in one of either two contexts: first, either an employee leaves or threatens to leave the employment of his employer and files a declaratory judgment action to have the covenant not to compete declared unenforceable; or second, the employee leaves or threatens to leave his employment and the employer seeks injunctive relief to have the covenant not to compete enforced. This section will outline the different procedural considerations for each of these scenarios.

¹⁰⁷ 157 So. 2d 133 (Miss. 1963).

¹⁰⁸ *Redd Pest Control Co.*, 157 So. 2d at 134.

¹⁰⁹ *Id.*

A. Drafting an Enforceable Covenant

*"The event is always a great teacher."*¹¹⁰

As with any other contract, the express terms of the covenant not to compete will be controlling upon the parties and upon the courts. Care must be taken to tailor the terms of the covenant to the needs of each party. For instance, in *Landry v. Moody Grishman Agency, Inc.*,¹¹¹ an employer who engaged in the insurance and real estate business sought to restrain a former employee from violating the terms of a non-compete agreement.¹¹² The contract of employment between the parties expired, and the parties continued the employment relationship on an implied basis.¹¹³ The chancery court granted the employer's request to enjoin the departing employee from engaging in the insurance business for a period of five years in the three coastal counties of Mississippi.¹¹⁴ Landry appealed this decision, and the Mississippi Supreme Court reversed and entered judgment in his favor.¹¹⁵ The court adhered to the express terms of the contract between the parties which, according to the court, were "plain and unambiguous."¹¹⁶ According to the terms of the contract, the covenant not to compete never became operative because it expressly stated that it "became operative only if (1) the contract was terminated before December 1, 1963, or (2) if the parties did not enter into a contract for further employment (after December 1, 1963)."¹¹⁷ The court found that "[n]either of the contingencies occurred."¹¹⁸

¹¹⁰ *The Nevada*, 106 U.S. 154, 157 (1882) (Bradley, J.).

¹¹¹ 181 So. 2d 134 (Miss. 1965).

¹¹² *Landry*, 181 So. 2d at 135-36.

¹¹³ *Id.* at 139.

¹¹⁴ *Id.* at 136.

¹¹⁵ *Id.* at 140. The court began its analysis by stating "[c]lauses in employment contracts providing for post employment restraints on the employees . . . are not favored by the law." *Id.* at 139.

¹¹⁶ *Landry*, 181 So. 2d at 139.

¹¹⁷ *Id.*

¹¹⁸ *Id.* In striking down the non-compete clause, the court stated, "[t]he standard is objective, measured by the language of the contract, not by the subjective intent or belief of a party which conflicts with meaning ascertained by the objec-

Because the previous contract for employment expired and the parties continued their relationship for an additional eight months on an implied basis, the court held:

In sum, Landry was not prohibited from competing with the Grishman Agency under the terms of the contract and the undisputed facts. A restrictive clause in a contract is not favored by the law and the Court will not exercise power which the contract itself does not invoke.¹¹⁹

The court stated that it would not supply missing essential terms to a contract and thus, rejected the application of the "blue pencil" rule to modify the restrictive covenant's duration or geographic scope.¹²⁰

In drafting a covenant not to compete, it is important to identify the proper parties and to spell out in the contract each party's respective rights regarding the following areas: assignability; choice of law; severability; duration; geographic scope; consideration; identification of trade secrets and confidential business information; identification of parties; identification of trade/occupation; liquidated damages; attorney fees; and court costs.¹²¹

tive standard." *Id.*

¹¹⁹ *Id.* at 140.

¹²⁰ *Landry*, 181 So. 2d at 139.

¹²¹ See *Sidag Aktiengesellschaft v. Smoked Foods Prods. Co.*, 776 F.2d 1270, 1275 (5th Cir. 1985) (finding that "the anti-competition clause of the contract was not triggered"); see also *LDDS Communications, Inc. v. Automated Communications, Inc.*, 35 F.3d 198, 201 (5th Cir. 1994) (construing inconsistency against drafter, LDDS, in refusing to enforce covenant not to compete). In *LDDS*, the court stated:

We will not write a contract for the parties. We may think that a contract was unwise or foolish, but that is no business of the courts. The impracticability of an urged reading becomes relevant when its level of foolishness and ambiguity creates uncertainty about what the parties agreed to. Here the hostility toward restraints of trade takes over, as we insist that the restraint be tailored to protection of the asset sold. . . . LDDS and Dial-Net did not read the contracts as they now do until this suit was filed in 1993.

LDDS, 35 F.3d at 201; *Herring Gas Co. v. Magee*, 22 F.3d 603, 607 (5th Cir. 1994) (holding that "[u]nder Mississippi law, contracting parties can decide which state's law will govern their agreement"); cf. *Sta-Home Home Health Agency, Inc.*

B. Obtaining an Employee's Signature

Usually, covenants not to compete are signed at the inception of the employment relationship. It is easier for the employer to present the document at that time for the employee's signature, since the employee is eager to begin work and usually will not hesitate to sign the agreement to begin his new job or career. Problems arise later when employers present covenants not to compete to an employee for signature once the employee has already begun working. In many cases, an employee will refuse to sign the agreement based upon knowledge received from co-workers, friends, or even counsel. In order to obtain a signature from a current employee, an employer might consider making a job promotion, bonus or increase in pay conditioned upon the employee signing a covenant not to compete. The Mississippi Supreme Court has determined that continued employment is sufficient to constitute consideration for the covenant not to compete.¹²²

C. Enforcement

*"To him that goes to law, nine things are requisite: A good deal of money, a good deal of patience, a good cause, a good attorney, good counsel, good evidence, a good jury, a good judge—and lastly, good luck."*¹²³

Probably the single most important factor for a party to consider when pursuing the enforcement of non-compete agreements is the cost involved in seeking relief from the court. The costs can be staggering because the events transpire at a rapid

v. Umphers, 562 So. 2d 1258, 1262 (Miss. 1990) (upholding chancellor's determination that parties' agreement was too "vague, indefinite and ambiguous as to be enforceable."); Riddell v. Respiratory Care Servs., 355 So. 2d 1376, 1377 (Miss. 1978) (determining that respiratory therapist was not true "competitor" within meaning of non-compete agreement); Hood Indus., Inc. v. King, 255 So. 2d 912, 915 (Miss. 1971) (holding that agreement regarding royalties on clay used to manufacture brick was not covenant not to compete).

¹²² Frierson v. Sheppard Bldg. Supply Co., 154 So. 2d 151, 154 (Miss. 1963).

¹²³ ANONYMOUS, HONE, EVERY-DAY BOOK, under February 14.

pace and require the parties to try their case during the preliminary injunction stages. Potential parties should consider these factors when deciding whether to pursue injunctive relief.

1. Venue

*"[E]quity is the idea of justice, which contravenes the written law."*¹²⁴

Article VI, section 159 of the Mississippi Constitution provides:

The chancery court shall have full jurisdiction in the following matters and cases, viz:

- (a) *All matters in equity*;
- (b) Divorce and alimony;
- (c) Matters testamentary and of administration;
- (d) Minor's business;
- (e) Cases of idiocy, lunacy, and persons of unsound mind;
- (f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation.¹²⁵

Since enforcement of covenants not to compete involves the issuance of an injunction—an equitable matter—jurisdiction is vested in the chancery court.¹²⁶ However, the case of *American Electric v. Singarayar*¹²⁷ demonstrates that venue may also be proper in the circuit court based upon a breach of contract claim.¹²⁸ The Mississippi Supreme Court addressed this issue briefly in *Singarayar*:

¹²⁴ ARISTOTLE, TREATISE ON RHETORIC 89 (Theodore Buckley trans. 1954).

¹²⁵ MISS. CONST. art. VI, § 159 (1890) (emphasis added).

¹²⁶ See MISS. CODE ANN. § 9-5-81 (1991) (providing jurisdiction of chancery court); see also *Lee v. Coahoma Opportunities, Inc.*, 485 So. 2d 293, 294-95 (Miss. 1986) (finding claim for specific performance of contract with request for injunctive relief within jurisdiction of chancery court); *Southern Bus Lines, Inc. v. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees*, 38 So. 2d 765, 768 (Miss. 1949) (holding that right to injunctive relief is basic ground of jurisdiction of court of equity).

¹²⁷ 530 So. 2d 1319 (Miss. 1988).

¹²⁸ *Singarayar*, 530 So. 2d at 1320.

This matter lies within the subject matter jurisdiction of the Circuit Court via American Electric's claim of damages for breach of contract coupled with its application for a writ of replevin. American Electric's claims for equitable relief lie within the pendent jurisdiction of the Circuit Court, as they arise out of the same transaction(s) or occurrence(s) as American Electric's claims at law.¹²⁹

2. *Declaratory Judgment Action*

Before an employee decides to leave the service of his employer and set up a competing enterprise, he may decide to file a declaratory judgment action to have his non-compete agreement declared invalid and unenforceable. This type of action by an employee brings the matter before the court quickly and typically results in a prompt determination. Experience tells us that an employee should have a very good reason as to the unenforceability of a covenant not to compete before bringing a declaratory judgment action.¹³⁰

3. *Injunctions*

*"Fresh justice is the sweetest."*¹³¹

Rule 65 of the Mississippi Rules of Civil Procedure sets out the procedure for obtaining a temporary restraining order and preliminary injunction. An injunction is defined as follows:

An injunction is a writ framed according to the circum-

¹²⁹ *Id.* at 1320 n.1 (citing *Hall v. Corbin*, 478 So. 2d 253, 255 (Miss. 1985)).

¹³⁰ See *Herring Gas Co. v. Magee*, 22 F.3d 603, 604-05 (5th Cir. 1994) (affirming grant of summary judgment in favor of employer who filed declaratory judgment action in federal district court seeking determination that non-compete agreement was enforceable against two prior employees); *Hensley v. E.R. Carpenter Co.*, 633 F.2d 1106, 1109-11 (5th Cir. 1980) (remanding employee's declaratory judgment action back to trial for determination of whether breach of contract was "vital"); *Taylor v. Cordis Corp.*, 634 F. Supp. 1242, 1252 (S.D. Miss. 1986) (ordering injunction prohibiting pacemaker salesman from competing for period of one year based upon detailed list of customers).

¹³¹ FRANCIS BACON, *THE WORKS OF FRANCIS BACON* 474 (Basil Montagu ed., Philadelphia, Carey & Hart 1853).

stances of the case, restraining an act which the court regards as contrary to equity and good conscience or commanding an act which it deems essential to justice. It is in the nature of a judgment and can issue only upon the order of a chancellor or of some other superior judge. It cannot be ordered by the clerk. The writ may issue on Sunday and it may be signed by circuit and supreme court judges as well as chancellors.

The writ had its origin in the inefficiency of the common law courts in that they had no power to protect rights except by punishment or by the award of damages for an antecedent violation of those rights. There was no authority in these courts to prevent a threatened or continuing wrong, nor to compel a wrongdoer to put matters *in statu quo* and thus undo his wrong. When, therefore, as to impending or continuing injuries, the limited common law remedies by way of compensation afforded no completely just and adequate relief, as was often the case, it was necessary, in order to give actual truth to the assertion that there should be no right without a remedy, that equity should intervene and furnish, in all cases, a just and complete remedy, and this it did by the aid of the injunction.¹³²

Because of the potential damage that a departing employee can inflict in such a short time, employers usually seek a temporary restraining order to keep the employee from competing until the employer can obtain a preliminary injunction.

a. Temporary Restraining Order

Rule 65(b) of the Mississippi Rules of Civil Procedure governs the application for temporary restraining orders. The rule provides:

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted, without notice to the adverse party or his attorney if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or

¹³² GEORGE D. WARNER, JR., WARNER'S GRIFFITH MISSISSIPPI CHANCERY PRACTICE § 434 (Rev. ed. 1991) (citations omitted).

damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes (except in domestic relations cases, when the ten-day limitation shall not apply), unless within the time so fixed the order for good cause shown is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be stated in the order.

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.¹³³

Rule 65(c) states that the party petitioning for the temporary restraining order must post a bond with the court "in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully

¹³³ MISS. R. CIV. P. 65(b).

enjoined or restrained.”¹³⁴ Neither the court rules nor case law tells us what amount is appropriate. Regardless, the employer should be prepared to post such bond at the hearing. Under Rule 65(b), a party can choose to apply for a temporary restraining order, either with or without notice to the adverse party.¹³⁵ The temporary restraining order by the terms of Rule 65(b) has a limited duration of ten days.¹³⁶ The rule and the comment to the rule state that this duration can be extended by the court upon a showing of good cause.¹³⁷ Once a party receives the temporary restraining order, he or she can then file a motion to convert it into a preliminary injunction.¹³⁸

b. Preliminary Injunction

Rule 65(a) of the Mississippi Rules of Civil Procedure sets forth two restrictions regarding preliminary injunctions.¹³⁹ First, “[n]o preliminary injunction shall be issued without notice to the adverse party.”¹⁴⁰ Second, the court has the discretion to order a consolidation of a trial on the merits with the preliminary injunction hearing.¹⁴¹ There are four factors that are considered when determining whether the issuance of a preliminary injunction is appropriate:

(1) whether “[t]here exists a substantial likelihood that plaintiff will prevail on the merits;”

(2) whether “[t]he injunction is necessary to prevent irreparable injury;”

(3) whether the “[t]hreatened injury to the plaintiff outweighs the harm an injunction may do to the defendants;” and

(4) whether the “[e]ntry of a preliminary injunction is con-

¹³⁴ MISS. R. CIV. P. 65(c). According to the comment, “Rule 65(c) continues . . . [the] traditional practice of requiring security in injunction proceedings, and vests in the sound discretion of the court the determination of the amount of security that will be required.” MISS. R. CIV. P. 65 cmt.

¹³⁵ MISS. R. CIV. P. 65(b).

¹³⁶ *Id.*

¹³⁷ MISS. R. CIV. P. 65 cmt.

¹³⁸ MISS. R. CIV. P. 65(b).

¹³⁹ MISS. R. CIV. P. 65(a).

¹⁴⁰ MISS. R. CIV. P. 65(a)(1).

¹⁴¹ MISS. R. CIV. P. 65(a)(2).

sistent with the public interest."¹⁴²

The comment to the rule eloquently describes the justification for the issuance of a preliminary injunction:

Although the fundamental fairness of preventing irreparable harm to a party is an important factor on a preliminary injunction application, the most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act. On the other hand, judicial intervention before the merits have been finally determined frequently imposes a burden on defendant that ultimately turns out to have been unjustified. Consequently, the preliminary injunction is appropriate whenever the policy of preserving the court's power to decide the case effectively outweighs the risk of imposing an interim restraint before it has done so.¹⁴³

c. Duration of Injunction

In *Frierson v. Sheppard Building Supply Co.*,¹⁴⁴ the Mississippi Supreme Court upheld the non-compete agreement of a general manager of a building supply company for a duration of two years within a fifty-mile radius.¹⁴⁵ The court held that the injunction must be measured from the date the employment ends and not the date of the issuance of the injunc-

¹⁴² WARNER, *supra* note 132, § 443; see *City of Durant v. Humphries County Memorial Hosp.*, 587 So. 2d 244, 250 (Miss. 1991) (discussing issuance of preliminary injunction). For additional authority regarding the issuance of a preliminary injunction, see *LDDS Communications, Inc. v. Automated Communications, Inc.*, 35 F.3d 198, 200 (5th Cir. 1994); *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990); *Concerned Women for America, Inc. v. Lafayette County*, 883 F.2d 32, 34 (5th Cir. 1989); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1576 (5th Cir. 1988); *Henry v. First Nat'l Bank*, 595 F.2d 291, 302 (5th Cir. 1979), *cert. denied sub nom. Claiborne Hardware Co. v. Henry*, 444 U.S. 1074 (1980); *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974); *Stack v. Tenneco, Inc.*, 641 F. Supp. 199, 202 (S.D. Miss. 1986); *Goldstein v. Allain*, 568 F. Supp. 1377, 1384 (N.D. Miss. 1983); *Sierra Club v. Bergland*, 451 F. Supp. 120, 131 (N.D. Miss. 1978).

¹⁴³ MISS. R. CIV. P. 65 cmt.

¹⁴⁴ 154 So. 2d 151 (Miss. 1963).

¹⁴⁵ *Frierson*, 154 So. 2d at 153.

tion.¹⁴⁶

4. *Burden of Proof*

The Mississippi Supreme Court has consistently held that "[t]he burden of proving the reasonableness of [the covenant not to compete] is on the employer."¹⁴⁷

¹⁴⁶ *Id.* at 156.

¹⁴⁷ *Empiregas, Inc. v. Bain*, 599 So. 2d 971, 975 (Miss. 1992); see *Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1043 (Miss. 1982) (stating employer bears burden of proving reasonableness); *Texas Rd. Boring Co. v. Parker*, 194 So. 2d 885, 889 (Miss. 1967) (noting that "employer has the burden of proving their reasonableness"). The court in *Arthur Murray Dance Studios v. Witter*, 105 N.E.2d 685, 693-94 (Cuyahoga County Ct. C.P. 1952), described the employer's procedural burden as:

In this type of case, heavy procedural burdens impede the plaintiff employer. Because the restraint sought to be imposed is one which restricts the exercise of a gainful occupation, it is a restraint in trade. It is cautiously considered, carefully scrutinized, looked upon with disfavor, strictly interpreted and reluctantly upheld. Being a contract in restraint of trade it is presumptively void. The employer shoulders the burden of proving the restraint reasonable and the contract valid. Even where the restraint is partial, the rule is not that it is good, but that it may be good. The fact that an employer has a written agreement that the employee will not, on leaving his employment, compete with his employer, that the employee breaks the agreement, that the employee quits his employer, that the employee starts working for a rival, and that the rival thereby becomes a more efficient competitor—all this, without more, does not automatically entitle the employer to an injunction. Since this is an equitable action, the employer must establish the standard requirements for equitable intervention.

5. Statute of Limitations

Although rarely at issue, the Mississippi Supreme Court has held that written covenants not to compete are governed by our residual three-year statute of limitations found in section 15-1-49 of the Mississippi Code.¹⁴⁸

6. Summary Judgment

Prior decisions tell us that summary judgment is an appropriate vehicle to the resolution of these types of claims provided no ambiguities exist in the covenant not to compete.¹⁴⁹

D. Damages

Perhaps the most important aspect of a suit to enforce a covenant not to compete is whether the court will issue injunctive relief. Damages are only a second consideration since the main goal of the employer is to physically prevent the employee from competing. Often times covenants not to compete contain a liquidated damages provision. The Mississippi Supreme Court has yet to address whether such a liquidated damages provision is enforceable. Another issue arises when the employer seeks both equitable relief and enforcement of such a provision. The Mississippi Supreme Court has not yet addressed the

Arthur Murray, 105 N.E.2d at 693-94 (citations omitted); see also *Taylor v. Cordis Corp.*, 634 F. Supp. 1242, 1248 (S.D. Miss. 1986) (holding that employer must "demonstrate the economic justification and the reasonableness, relating to both duration and geographical scope, of the restraint."); *Sivley v. Cramer*, 61 So. 653, 654 (Miss. 1913) (stating that "burden of showing the reasonableness of such a contract by evidence aliunde rests upon the party seeking to enforce it").

¹⁴⁸ *Hill v. Southeastern Floor Covering Co.*, 596 So. 2d 874, 879 n.2 (Miss. 1992).

¹⁴⁹ *Burkhalter & Co. v. Wissner*, 602 So. 2d 835, 837-38 (Miss. 1992) (holding that genuine issues of material fact existed as to whether sale of computer software programs to clients constituted "accounting services" within meaning of non-compete agreement); see, e.g., *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985) (stating that where terms of contract are clear, question of law exists); *Dennis v. Searle*, 457 So. 2d 941, 944-45 (Miss. 1984) (finding summary judgment appropriate where contract is clear); see also *Hensley v. E.R. Carpenter Co.*, 633 F.2d 1106, 1108-09 (5th Cir. 1980) (reversing district court's entry of summary judgment in favor of employer).

question of whether an employer is entitled to injunctive relief and liquidated damages.

Since the employer is required to post a bond when seeking the temporary restraining order and/or preliminary injunction, the court may award damages to the employee from the bond posted should the court later determine that the employee has been wrongfully enjoined.¹⁵⁰

In *Lovett v. E.L. Garner, Inc.*,¹⁵¹ the Mississippi Supreme Court enunciated the general rule regarding damages for a breach of contract action:

In Mississippi, one may recover for loss of future profits in a breach of contract action as long as such profits are proved with reasonable certainty, not based on speculation or conjecture. In calculating loss of future profits, such loss is that of net profits as opposed to gross profits. To ascertain net profits, a party must deduct such items as overhead, depreciation, taxes and inflation. Further, future profits should always be discounted at an appropriate rate to arrive at present value. And, finally, the plaintiff must mitigate damages if he is able to do so.¹⁵²

The problem with enforcement of covenants not to compete is that "[m]oney damages for such a loss [of good will] would be virtually impossible to compute, and equitable relief is proper in the absence of an adequate remedy at law."¹⁵³

¹⁵⁰ See WARNER, *supra* note 132, § 464 (discussing award of damages against party seeking injunction).

¹⁵¹ 511 So. 2d 1346 (Miss. 1987).

¹⁵² *Lovett*, 511 So. 2d at 1353 (citations omitted).

¹⁵³ *Taylor v. Cordis Corp.*, 634 F. Supp. 1242, 1250 (S.D. Miss. 1986).

E. Sanctions/Attorney Fees

In *Tricon Metals and Services, Inc. v. Topp*,¹⁵⁴ the Mississippi Supreme Court awarded attorney's fees to a former employee under Rule 11 because a non-compete provision was not present in the parties' agreement.¹⁵⁵ The employer sought an injunction but could not prove that the employee had actually signed a covenant not to compete.¹⁵⁶ Specifically, the court awarded \$3500 in attorney's fees on the sole basis that the employer filed the action over a contract which could not be produced for the court.¹⁵⁷

F. Appellate Review

1. Standard of Review

The recent case of *Empiregas, Inc. v. Bain*¹⁵⁸ set out the current standard of review:

When considering the enforceability of restrictive employment agreements, we review the entire record and "the evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact, must be accepted." We will not disturb the findings of the lower court when they are supported by substantial evidence unless the [c]hancellor has abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.¹⁵⁹

2. Interlocutory Appeal

Rule 5 of the new Mississippi Rules of Appellate Procedure governs the use of interlocutory appeals as they pertain to preliminary injunctions. Rule 5 states that in order to be considered for an interlocutory appeal, a party must be able to show:

¹⁵⁴ 537 So. 2d 1331 (Miss. 1989).

¹⁵⁵ *Tricon*, 537 So. 2d at 1333.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1334.

¹⁵⁸ 599 So. 2d 971 (Miss. 1992).

¹⁵⁹ *Empiregas, Inc.*, 599 So. 2d at 975 (citations omitted).

[A] substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

(1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or

(2) Protect a party from substantial and irreparable injury; or

(3) Resolve an issue of general importance in the administration of justice.¹⁶⁰

The rule also specifies the exact procedural requirements that are necessary to perfect an interlocutory appeal.¹⁶¹

In *Singarayar*, the Mississippi Supreme Court held that the issue of whether the circuit judge properly refused to grant a preliminary injunction was not appropriate for interlocutory appeal.¹⁶² The court ultimately denied American Electric's petition for interlocutory appeal on the basis that there was no "substantial basis . . . for a difference of opinion" on the legal standards for the grant or denial of a preliminary injunction.¹⁶³ The court found that the circuit court had merely "passed the buck" in certifying the issue for interlocutory appeal to the Mississippi Supreme Court.¹⁶⁴ The court held that the circuit court had failed to rule on the sole issue of whether the court should issue the preliminary injunction based on the facts of the case.¹⁶⁵

¹⁶⁰ MISS. R. APP. P. 5(a).

¹⁶¹ MISS. R. APP. P. 5.

¹⁶² *American Elec. v. Singarayar*, 530 So. 2d 1319, 1321-22 (Miss. 1988). In *Singarayar*, the former employee had signed a non-compete agreement during his employment. *Singarayar*, 530 So. 2d at 1320. After four years of working for American Electric, Singarayar terminated his employment and began working for a competitor. *Id.*

¹⁶³ *Id.* at 1324. The court stated that the core of the dispute concerned the gravity of harm inflicted upon the employer and did not turn on a question of law. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Singarayar*, 530 So. 2d at 1323. The court stated that interlocutory appeals "should rarely be granted" to settle a factual dispute. *Id.*; cf. *Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1042-44 (Miss. 1982) (reversing chancellor's enforcement of covenant not to compete on interlocutory appeal).

3. Mootness

In *Monaghan v. Blue Bell, Inc.*,¹⁶⁶ the Mississippi Supreme Court dismissed the departing employee's appeal because briefs and oral argument had been submitted four days after the expiration of the one year injunction, thus rendering the case moot.¹⁶⁷ The court noted that the controversy had expired by the time of review.¹⁶⁸ Thus, an employer seeking to enforce a non-compete agreement should attempt to expedite all hearings and further request that the court consolidate the preliminary injunction hearing with the trial on the merits pursuant to Rule 65(a)(2) of the Mississippi Rules of Civil Procedure.

V. OCCUPATIONS/TRADES

A. Sales

1. Insurance Sales

In *Thames v. Davis & Goulet Ins., Inc.*,¹⁶⁹ the Mississippi Supreme Court dissolved a temporary injunction prohibiting an insurance salesman from competing against his former employer.¹⁷⁰ The covenant which the former employee had signed did not state a duration or geographic scope.¹⁷¹ The agreement simply prohibited the solicitation of any customers belonging to Davis & Goulet Insurance, Inc.¹⁷² On interlocu-

¹⁶⁶ 393 So. 2d 466 (Miss. 1980).

¹⁶⁷ *Monaghan*, 393 So. 2d at 466-467.

¹⁶⁸ *Id.* at 466. The court asserted that it lacked the power to issue advisory opinions or to settle abstract questions. *Id.* at 467; see *Bradley v. State ex rel. Patterson*, 355 So. 2d 675, 676 (Miss. 1978) (dismissing habeas corpus claim as moot, since detainee was no longer imprisoned); *Insured Savings & Loan Ass'n v. State*, 135 So. 2d 703, 706 (Miss. 1961) (holding that review proceedings were inappropriate to settle abstract or academic questions).

¹⁶⁹ 420 So. 2d 1041 (Miss. 1982).

¹⁷⁰ *Thames*, 420 So. 2d at 1044. Thames sold insurance for Davis & Goulet, acting as an agent for several casualty insurance companies in Jackson, Mississippi. *Id.* at 1041. Thames began his employment in 1975 and signed a contract of employment which contained a non-compete agreement. *Id.* at 1041-42.

¹⁷¹ *Id.* at 1041-42.

¹⁷² *Id.*

tory appeal, the Mississippi Supreme Court reversed the chancellor's determination that the contract was enforceable.¹⁷³ In making its decision, the Supreme Court noted that Davis & Goulet "failed to meet the burden of proof imposed upon it in seeking to enforce the contract" by not attempting to prove the reasonableness and necessity for enforcement of the covenant.¹⁷⁴

In *Landry v. Moody Grishman Agency, Inc.*,¹⁷⁵ the employer sought to enforce a non-compete agreement which would have prohibited a former employee from competing for a period of five years in the coastal counties of Mississippi.¹⁷⁶ The Mississippi Supreme Court reversed the chancellor's enforcement of the contract on the basis that the employment contract, by its own terms, had expired, thus rendering it unenforceable.¹⁷⁷

In *Bagwell v. H.B. Wellborn & Co.*,¹⁷⁸ the Mississippi Supreme Court addressed the validity of a non-compete agreement contained in an employment contract for an insurance adjuster.¹⁷⁹ The covenant not to compete prohibited the employee from competing for a period of two years within a seventy-five mile radius of the corporate limits of the City of Meridian.¹⁸⁰ The court affirmed the chancellor's issuance of an injunction prohibiting the employee from competing based upon the evidence presented by the employer.¹⁸¹ Specifically, the court found "the contract here involved was reasonable as to time, territory, and the nature of the employment or trade

¹⁷³ *Thames*, 420 So. 2d at 1042.

¹⁷⁴ *Id.*

¹⁷⁵ 181 So. 2d 134 (Miss. 1965).

¹⁷⁶ *Landry*, 181 So. 2d at 135-36. The employer, Moody Grisham Agency, Inc., was engaged in the real estate and general insurance business in Biloxi, Mississippi. *Id.* at 135.

¹⁷⁷ *Id.* at 139-40. The court applied an objective standard to interpret the language of the contract. *Id.*

¹⁷⁸ 156 So. 2d 739 (Miss. 1963).

¹⁷⁹ *Bagwell*, 156 So. 2d at 739-402.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 741. The former employee had allegedly used information and client lists of his former employer. *Id.* at 740. The court determined that this information greatly assisted him in becoming an independent adjuster. *Id.* at 741.

protected.¹⁸²

2. Pest Control

In *Redd Pest Control Co. v. Heatherly*,¹⁸³ the chancellor refused to issue an injunction prohibiting a former employee of the pest control company from competing on a state-wide basis.¹⁸⁴ On appeal, the supreme court utilized the "blue pencil" rule to modify the geographic scope of the covenant to a fifty-mile radius from the place of employment.¹⁸⁵

3. Medical Industry

In *Sta-Home Home Health Agency, Inc. v. Umphers*,¹⁸⁶ the Mississippi Supreme Court upheld the chancellor's denial of injunctive relief to an employer of contract nurses.¹⁸⁷ The court ruled that the employment contract was vague and that the employer had violated the "clean hands" doctrine in the manner in which it had dealt with its contract nurses.¹⁸⁸

Further, in *Riddell v. Respiratory Care Servs.*,¹⁸⁹ the Mississippi Supreme Court reversed the chancellor's decision to enjoin an employee from competing against his former employer as a respiration therapist.¹⁹⁰ In its determination, the court reasoned that the former employee was not actually "in competition" with his former employer and thereby refused to uphold the issuance of the injunction.¹⁹¹

¹⁸² *Bagwell*, 156 So. 2d at 740. The court noted that there would be no undue hardship on the former employee. *Id.*

¹⁸³ 157 So. 2d 133 (Miss. 1963).

¹⁸⁴ *Redd*, 157 So. 2d at 133. The covenant specified a two-year restriction. *Id.* at 134.

¹⁸⁵ *Id.* at 136. The court acknowledged that the employer had sufficiently shown the reasonableness of a 50-mile restriction. *Id.*

¹⁸⁶ 562 So. 2d 1258 (Miss. 1990).

¹⁸⁷ *Sta-Home*, 562 So. 2d at 1263.

¹⁸⁸ *Id.* at 1262-63. The "clean hands" doctrine provides that those who seek relief in equity must themselves be free of improper conduct. *Id.* at 1263.

¹⁸⁹ 355 So. 2d 1376 (Miss. 1978).

¹⁹⁰ *Riddell*, 355 So. 2d at 1376.

¹⁹¹ *Id.* at 1377.

In *Taylor v. Cordis Corp.*,¹⁹² a pacemaker salesman brought a declaratory judgment action to have his non-compete agreement declared void on the grounds that his employer had breached the implied duty of good faith and fair dealing owed to the salesman.¹⁹³ The employer counterclaimed for a preliminary injunction to enforce the agreement.¹⁹⁴ The district court held that the employer met the four criteria for the issuance of a preliminary injunction, and thereby prohibited the employee from making contact with previous customers.¹⁹⁵ The covenant not to compete did not contain a geographic scope, so the court utilized the "blue pencil" rule to provide a list of former customers for the geographic scope of the covenant.¹⁹⁶

4. Temporary Personnel Agencies

In *Donahoe v. Tatum*,¹⁹⁷ the Mississippi Supreme Court affirmed an injunction which prevented a former employee of a personnel agency from competing against her employer within Hinds County for a period of five years.¹⁹⁸ The court held that the employer had met its burden of proving reasonableness and that enforcement of the covenant would not create a monopoly.¹⁹⁹

5. Real Estate Appraisers

In the case of *Matheney v. McClain*,²⁰⁰ the employer sought to enjoin two former employees from competing with its

¹⁹² 634 F. Supp. 1242 (S.D. Miss. 1986).

¹⁹³ *Taylor*, 634 F. Supp. at 1246. The salesman alleged that he suffered embarrassment when he had to inform his clients of the defects in the pacemaker. *Id.* at 1245-46. As a result, the salesman resigned and began working for a competing medical supplier. *Id.*

¹⁹⁴ *Id.* at 1243.

¹⁹⁵ *Id.* at 1247-51.

¹⁹⁶ *Taylor*, 634 F. Supp. at 1247-50. The court found the one-year duration period to be reasonable. *Id.* at 1249.

¹⁹⁷ 134 So. 2d 442 (Miss. 1961).

¹⁹⁸ *Donahoe*, 134 So. 2d at 445.

¹⁹⁹ *Id.*

²⁰⁰ 161 So. 2d 516 (Miss. 1964).

appraisal business.²⁰¹ The non-compete agreements prohibited the departing employees from competing within a two-hundred-mile radius of the City of Jackson, Mississippi, or a one hundred-mile radius of any branch office for a period of two years.²⁰² The court denied the injunction ruling that the employer had unilaterally breached the employment contract by reducing the employee's wages.²⁰³

6. Road Construction

In *Texas Road Boring Co. v. Parker*,²⁰⁴ the court affirmed an injunction against a road construction company manager which prevented him from competing within a geographic radius of one hundred miles of any "city, town, or village in the United States" where the manager had been employed by the company.²⁰⁵ Relying on case precedent, the court held that the terms of the agreement were reasonable for the industry, and thus, enforceable.²⁰⁶

²⁰¹ *Matheney*, 161 So. 2d at 517. The employee sought other employment after their wages were reduced. *Id.* at 518-19.

²⁰² *Id.* at 518. The covenant also contained a liquidated damages provision of \$125 per week as long as any violation occurred. *Id.*

²⁰³ *Id.* at 520

²⁰⁴ 194 So. 2d 885 (Miss. 1967).

²⁰⁵ *Texas Rd. Boring*, 194 So. 2d at 885-86. The covenant contained a two-year restriction. *Id.* at 887.

²⁰⁶ *Id.* at 888-89 (citing *Wilson v. Gamble*, 177 So. 363, 365 (Miss. 1937)); see *Wellborn & Co.*, 156 So. 2d 739 (Miss. 1963) (holding two-year, 75-mile restrictive covenant valid); *Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151, 156 (Miss. 1963) (finding two-year, 50-mile restrictive covenant reasonable and enforceable); *Bagwell v. H.B. Donahoe v. Tatum*, 134 So. 2d 442, 445 (Miss. 1961) (holding that restrictive covenant limiting competition to Hinds County area for five years reasonable).

7. Propane Gas

In the case of *Empiregas, Inc. v. Bain*,²⁰⁷ the supreme court refused to enforce the non-compete agreement of a former propane gas salesman.²⁰⁸ The non-compete agreement prohibited the employee from competing with Empiregas for a period of three years within a fifty-mile radius of any location at which he had worked within the twenty four months prior to his termination.²⁰⁹ Specifically, the court based its decision on the finding that the employee's termination was "in bad faith."²¹⁰

In *Herring Gas Co. v. Magee*,²¹¹ the Fifth Circuit Court of Appeals affirmed the district court's enforcement of a covenant not to compete against a former supervisor of a regional propane gas company.²¹² The covenant prohibited the former employee from competing within a fifty-mile radius of any location of Herring Gas, which included locations in Mississippi and Louisiana, for a period of six years.²¹³ The court applied the law of the forum state, Mississippi, pursuant to the terms of the contract, and held that the district court properly granted summary judgment in favor of the employer.²¹⁴

²⁰⁷ 599 So. 2d 971 (Miss. 1992).

²⁰⁸ *Empiregas, Inc.*, 599 So. 2d at 973. The court noted that the employer failed to show the reasonableness of the restrictive covenant. *Id.* at 975.

²⁰⁹ *Id.* at 973.

²¹⁰ *Id.* at 975-76.

²¹¹ 22 F.3d 603 (5th Cir. 1994).

²¹² *Herring Gas Co.*, 22 F.3d at 604.

²¹³ *Id.* at 605-06.

²¹⁴ *Id.* at 605. Louisiana state law limits restrictive covenants to a period of two years. *Id.*

B. Manufacturing

In *Hensley v. E.R. Carpenter Co.*,²¹⁵ an employee of an urethane foam manufacturer brought a declaratory judgment action seeking to have his non-compete agreement declared invalid.²¹⁶ The United States District Court for the Northern District of Mississippi entered summary judgment in favor of the employer, while modifying the geographic scope of the covenant to a three-hundred-mile radius from the place of employment.²¹⁷ The Fifth Circuit reversed, however, ruling that the employer had breached the covenant not to compete when it unilaterally reduced the employee's salary which was set in the agreement.²¹⁸

C. Medical Profession

With respect to the medical profession, in *Wilson v. Gamble*,²¹⁹ the Mississippi Supreme Court upheld the enforcement of non-compete agreements against two physicians who left the practice of a partnership in Greenville, Mississippi.²²⁰ The covenants prohibited the physicians from competing for a period of five years within the "City of Greenville, Washington County, Mississippi, or within five miles of the corporate limits of said City of Greenville."²²¹ The court determined that the terms of the agreements were reasonable, and noted that the enforcement of the covenant would not impose an undue hardship on the departing physicians.²²² Further, the court determined that the enforcement of the covenant would not cause a shortage of physicians in the Greenville area.²²³

²¹⁵ 633 F.2d 1106 (5th Cir. 1980).

²¹⁶ *Hensley*, 633 F.2d at 1107.

²¹⁷ *Id.* at 1108.

²¹⁸ *Id.* at 1109-12.

²¹⁹ 177 So. 2d 363 (Miss. 1937).

²²⁰ *Wilson*, 177 So. at 365. The court noted that an enforcement of the covenants could not result in a monopoly. *Id.* at 366.

²²¹ *Id.*

²²² *Id.* at 365-66.

²²³ *Id.*

D. Legal Profession

The Mississippi Supreme Court has yet to determine whether restrictive covenants are enforceable in the legal profession. Recognizing the public interest in allowing clients to exercise their freedom of choice in selecting counsel, it is unlikely that the Mississippi Supreme Court would enforce a covenant not to compete in a legal setting.²²⁴ However, since there is an ever-increasing supply of attorneys, the court may find that enforcement of such an agreement would not substantially affect the public's right to freedom of choice in selecting legal counsel in Mississippi.

²²⁴ Other jurisdictions have specifically relied on their state rules of professional conduct to hold that non-compete agreements are unenforceable in the legal profession. See *Blackburn v. Sweeney*, 637 N.E.2d 1340, 1344 (Ind. App. 1994) (holding non-compete agreement which prohibited law firm advertising violated rules of professional conduct); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 603-04 (Iowa 1990) (ruling that non-compete agreement in law firm was unenforceable); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 155 (N.J. 1992) (noting that rule prohibiting non-compete agreements in legal profession served to protect public interest); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 531 (Tenn. 1991) (ruling law firm non-compete agreement unenforceable); but see *Howard v. Babcock*, 863 P.2d 150, 159 (Cal. 1993) (holding rules of professional conduct not violated by law firm's agreement imposing fee on departing partners). The reason that professional conduct standards prohibit such agreements is to guard against anti-competitive practices which would increase the cost of legal services. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 823 (2d ed. Supp. 1992).

The Mississippi Rules of Professional Conduct provides that:

A lawyer *shall not* participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

MISS. R. PROF. CONDUCT 5.6 (1994) (emphasis added).

E. Accounting Profession

In *Burkhalter & Co. v. Wissner*,²²⁵ an accounting firm sought to enforce a covenant not to compete which would prevent a former employee from rendering "accounting services" to any person serviced by the firm.²²⁶ The Mississippi Supreme Court determined that an ambiguity existed in the contract as to whether "accounting services" included or excluded the sale of computerized software, which was the nature of the former employee's new job.²²⁷ Accordingly, the court reversed and remanded the case for trial to resolve the ambiguity.²²⁸

F. Lease Provisions

In *Parker v. Lewis Grocer Co.*,²²⁹ a lease contained a restrictive clause which prohibited the landlord from leasing any other space in the Maywood Shopping Center for use as a supermarket in competition with the tenant, Lewis Grocer.²³⁰ The landlord later entered into contract negotiations with Jitney Jungle regarding a proposed expansion of the shopping center.²³¹ The Mississippi Supreme Court affirmed the injunction against the landlord, utilizing a balancing test to verify the reasonableness of the agreement.²³² The court also noted that

²²⁵ 602 So. 2d 835 (Miss. 1992).

²²⁶ *Burkhalter & Co.*, 602 So. 2d at 835-36. The former employee was a computer software programmer. *Id.* at 836.

²²⁷ *Id.* at 837.

²²⁸ *Id.* at 837-38. The court stated that ambiguities in a contract cannot be resolved by summary judgment. *Id.* 2d at 837; *see, e.g.*, *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985) (holding ambiguities in contract between insurers should not be decided by summary judgment); *Biggers v. Fox*, 456 So. 2d 761, 762 (Miss. 1984) (holding case involved questions of fact, thus, summary judgment was premature); *Dennise v. Searle*, 457 So. 2d 941, 944-45 (Miss. 1984) (holding that interpretation of unclear contract involved questions of fact for jury, making summary judgment procedure inappropriate).

²²⁹ 153 So. 2d 261 (Miss. 1963).

²³⁰ *Parker*, 153 So. 2d at 263.

²³¹ *Id.* at 264.

²³² *Id.* at 270-71 (citing *Donahoe v. Tatum*, 134 So. 2d 442, 444 (Miss. 1962)). The court stated that covenants broader than the one at issue in this case have been enforced by the court. *Id.* at 271; *see Wilson v. Gamble*, 177 So. 363 (Miss. 1937) (holding that five-year, five-mile covenant on physician was reasonable).

"there is always involved in such leases, the covenant of good faith and fair dealings."²³³

VI. SALE OF A BUSINESS

A. *Different Standard*

In *Cooper v. Gidden*,²³⁴ the Mississippi Supreme Court ruled that the different standard exists with respect to the enforceability of a covenant not to compete contained in an employment contract versus those in a contract for the sale of a business.²³⁵ Specifically, the court stated that a restrictive covenant which a seller or business purchaser enters into will receive greater validity by the court than a restrictive covenant in an employment contract.²³⁶ The court reasoned that a departing employee's need for flexibility in finding a new job is greater than the needs of a seller of a business who has been adequately compensated.²³⁷

B. *Covenant Contained in Sales Contract*

In *Townsend v. Hurst*,²³⁸ a physician who practiced in Carroll County, Mississippi sold his tract of land and small stock of medicine to another practicing physician in the area.²³⁹ The sales contract specifically included the good will of the business.²⁴⁰ The selling physician had represented to the buyer that he was in bad health and that he intended to move to Florida after the sale.²⁴¹ Instead of keeping his promise, the seller returned to the area within a mile and a half of

²³³ *Id.* at 274. The court indicated that an ambiguity arose as to whether the covenant covered extensions to the shopping center. *Id.* at 265-66.

²³⁴ 515 So. 2d 900, 904 (Miss. 1987).

²³⁵ *Cooper*, 515 So. 2d 900 (Miss. 1987).

²³⁶ *Id.* at 905.

²³⁷ *Id.*

²³⁸ 37 Miss. 679 (1859).

²³⁹ *Townsend*, 37 Miss. at 680.

²⁴⁰ *Id.*

²⁴¹ *Id.* The selling physician stated that he would recommend the buyer to the community as a physician. *Id.*

the buyer and resumed his practice.²⁴² The supreme court ruled in favor of the buyer, finding that the seller's actions were a violation of good faith and thereby constituted fraud.²⁴³

C. Good Will

*"We are not here to sell a parcel of boilers and vats, but the potentiality of growing rich beyond dreams of avarice."*²⁴⁴

In *Sivley v. Cramer*,²⁴⁵ the Mississippi Supreme Court defined the good will of a business as "the probability that the customers will resort to the old place for the purpose of trade."²⁴⁶ Further, the court has stated that the good will of a business is "dependent on the contractor, customer relationship, like that of a competing business to another competing entity."²⁴⁷ Thus, it is the transfer or destruction of good will that an employer strives to protect in enforcing such restrictions. No business can succeed without its good will and reputation.

D. Assignability of Existing Covenants

The issue of the assignability of a covenant not to compete arises when a subsequent purchaser seeks to enforce the re-

²⁴² *Id.*

²⁴³ *Townsend*, 37 Miss. at 681. See *Main Street Publishers, Inc. v. Landmark Communications, Inc.*, 701 F. Supp. 1289, 1290 (N.D. Miss. 1988) (concerning covenant in contract for sale of newspaper); *Morgan v. Jacobs*, 200 So. 2d 443, 445-46 (Miss. 1967) (upholding non-compete agreement in contract for sale of newspaper); see also *Jackson v. Price*, 140 Miss. 249, 256 (1925) (upholding covenant in contract for sale of restaurant business); *Cumberland Tel. & Telegraph Co. v. State*, 100 Miss. 102, 120 (1911) (upholding restrictive clause in contract regarding long distance telephone business). But see *Anderson v. Faulconer*, 30 Miss. 145, 146-47 (1855) (holding covenant not assignable to subsequent purchaser).

²⁴⁴ JAMES BOSWELL, *BOSWELL'S LIFE OF JOHNSON* 100-01 (George Birkbeck Hill ed., Bigelow Brown 1959).

²⁴⁵ 61 So. 653 (Miss. 1913).

²⁴⁶ *Sivley*, 61 So. at 654.

²⁴⁷ *Texas Rd. Boring Co.*, 194 So. 2d at 889.

striction against the party who originally entered into the agreement with the former owner. To avoid such a problem, the agreement should contain a provision stating the parties' intentions with respect to assignability. In reality, however, the parties often fail to include such a provision in their contract. Confusion and inconsistency result.

The Mississippi Supreme Court most recently addressed the issue in the case of *Herring Gas Co. v. Whiddon*.²⁴⁸ There, the court ruled that where the contract is silent as to assignability, there is a presumption that the covenant passes with the business.²⁴⁹

Experience tells us that parties should make certain that the contract they are contemplating contains a provision addressing the issue of assignability.

VII. CONCLUSION

*"Caveat emptor"*²⁵⁰

Employers seeking to utilize covenants not to compete should be careful to ensure that it is reasonable in all respects with respect to the applicable trade or industry. Moreover, the covenant should specify the exact interests that the employer seeks to protect. By the same token, employees should be leery of signing such covenants and should be cautioned that, contrary to popular public opinion, they are alive and enforceable in Mississippi.

²⁴⁸ 616 So. 2d 892 (Miss. 1993).

²⁴⁹ *Herring Gas Co.*, 616 So. 2d at 898-99; see *Knowles v. Jones*, 62 So. 514, 515 (Ala. 1913) (holding that covenant not to compete inures to benefit of assignee). But see *Anderson v. Faulconer*, 30 Miss. 145, 146-47 (1855) (holding that covenant was unenforceable as to subsequent purchaser).

²⁵⁰ Let the buyer beware. BLACK'S LAW DICTIONARY 222 (6th ed. 1990).

COMMENTS

ASSUMPTION OF RISK IN MISSISSIPPI: ELIMINATING THE CONFUSION WHILE RETAINING THE DEFENSE— INDEPENDENT OF COMPARATIVE NEGLIGENCE PRINCIPLES

For over a century, Mississippi jurisprudence has recognized the affirmative defense of assumption of risk¹ in personal injury litigation. With certain limitations, this defense continues to preclude a plaintiff's recovery when the plaintiff's injury results from his voluntary exposure to a known risk. However, a recent decision of the Mississippi Supreme Court indicates that, despite its long history, this defense may be on the eve of abrogation.² This comment attempts to refute the reasons for this defense's waning viability and to provide justification for its continued and expanded application.

¹ The maxim *volenti non fit injuria*, which means "he who consents cannot receive an injury," developed the doctrine of assumption of risk. 65A C.J.S. *Negligence* § 174(1) (1966).

² See *Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss. 1994) (abrogating "open and obvious" defense in premises liability cases because its effect of completely barring plaintiff recovery was held inconsistent with apportionment principles of comparative negligence); see *infra* notes 110-12 and accompanying text.

I. ASSUMPTION OF RISK: AN OVERVIEW

Assumption of risk refers to the tort doctrine under which a plaintiff's voluntary exposure to a known risk may relieve a defendant of liability.³ In order for a defendant to prevail under this theory, he must establish three elements:

- (1) Knowledge on the part of the injured party of a condition inconsistent with his safety; (2) appreciation by the injured party of the danger in the condition; and (3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition.⁴

When established, these elements reveal that the plaintiff comprehended an impending peril and was willing to encounter

³ WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 68 at 440 (4th ed. 1971). While the doctrine of assumption of risk has been defined and categorized in many, sometimes confusing, ways, the doctrine is usually divided into its "primary" and "secondary" forms. See generally PROSSER, *supra* § 67; 57A AM. JUR. 2D *Negligence* §§ 809-12 (1989) (advocating three forms into which assumption of risk may be divided); Robert L. Spell, *Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk*, 8 MISS. C. L. REV. 159, 165 (1987). Secondary assumption of risk has been described as synonymous with contributory negligence and requires an objective "reasonable man" analysis. 57A AM. JUR. 2D *Negligence* §§ 809-12 (1989). This secondary form of the doctrine is not the focus of this comment. Rather, this comment focuses on the doctrine in its primary form. Primary assumption of risk includes both express and implied voluntary acceptances of a known risk on the part of the plaintiff. 57A AM. JUR. 2D *Negligence* §§ 809-12 (1989). "Express" assumption of risk involves a contractual relationship and refers to the situation wherein the plaintiff has given the defendant consent to relieve the defendant of an obligation of conduct otherwise owed. 65A C.J.S. *Negligence* § 174(1) (1966). "Implied" assumption of risk encompasses those circumstances where the plaintiff, aware of a previously created risk, proceeds voluntarily to encounter it. PROSSER, *supra* § 68. Unlike contributory negligence, the focus of primary assumption of risk is the subjective knowledge and conduct of the plaintiff. 57A AM. JUR. 2D *Negligence* §§ 809-12 (1989).

⁴ *Elias v. New Laurel Radio Station, Inc.* 146 So. 2d 558, 561-62 (Miss. 1962) (quoting Paul N. Nunnery, Note, 19 MISS. L.J. 369, 370 (1947-48)). The knowledge element can be satisfied by direct evidence of the plaintiff's realization of the dangerous condition or by circumstantial evidence showing that the plaintiff must have known. *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1224 (5th Cir. 1984).

it.⁵ Assumption of risk does not necessarily entail fault or negligence on the part of the plaintiff.⁶ Moreover, a plaintiff is precluded from recovering under this doctrine despite any negligence on the part of the defendant.⁷ Where the defense is recognized, the rationale for its existence is that a plaintiff should not be able to hold another person liable when the plaintiff voluntarily exposed himself to a known risk of harm which he could have avoided.⁸

Assumption of risk has been recognized as a viable defense in Mississippi tort law since 1890.⁹ The Mississippi Supreme Court has repeatedly recognized that, where a defendant establishes the above quoted elements, the plaintiff will be precluded from recovery.¹⁰ While the Mississippi Legislature has abrogated the defense specifically as it would otherwise apply in actions involving an employer's negligence resulting in an employee's injury,¹¹ the defense remains "in full force in this state."¹² Nevertheless, the doctrine has been under attack in many jurisdictions, including this one, for its perceived inconsistency with principles of comparative negligence.¹³

⁵ 65A C.J.S. *Negligence* § 174(1) (1966). It has been repeated that assumption of risk involves an inherent characteristic of "venturousness" on the part of the plaintiff. See *Shurley v. Hoskins*, 271 So. 2d 439, 443 (Miss. 1973) (stating that assumption of risk involves mental state of willingness to deliberately venture forth into situation containing dangers); *Herod v. Grant*, 262 So. 2d 781, 783 (Miss. 1972) (recognizing venturesome characteristic inherent in third element of defense); see also *infra* notes 68-76 and accompanying text.

⁶ 65A C.J.S. *Negligence* § 174(1) (1966).

⁷ *Walker v. Kerr-McGee Chemical Corp.*, 793 F. Supp. 688, 698 (N.D. Miss. 1992). "[T]o acquiesce in, or consent to, a course of negligent conduct is to assume the risks incident thereto. . . ." 65A C.J.S. *Negligence* § 174(1) (1966). But see *McLeod v. Whitten*, 413 So. 2d 1020, 1023-24 (Miss. 1982) (suggesting that assumption of risk instruction should contain requirement that defendant be free of negligence).

⁸ 65A C.J.S. *Negligence* § 174(1) (1966).

⁹ While not specifically mentioning the defense, the Mississippi Constitution effectively abolished the defense as it applied to railroad employees. See MISS. CONST. art. VII, § 193; see also *infra* notes 24, 29 and accompanying text.

¹⁰ See *Nichols v. Western Auto Supply Co.*, 477 So. 2d 261, 264 (Miss. 1985); *Alley v. Praschak Mach. Co.*, 366 So. 2d 661, 665 (Miss. 1979).

¹¹ See MISS. CODE ANN. § 11-7-19 (1989); *McDonald v. Wilmut Gas & Oil Co.*, 176 So. 395, 397 (Miss. 1937); *infra* notes 24-31 and accompanying text.

¹² *Saxton v. Rose*, 29 So. 2d 646, 648 (1947).

¹³ See generally 57B AM. JUR. 2D *Negligence* § 1201 (1989) (discussing

II. COMPARATIVE NEGLIGENCE AND ITS PERCEIVED INCONSISTENCY WITH ASSUMPTION OF RISK

Almost every state in this country has adopted some form of comparative negligence.¹⁴ In most instances, this adoption was a reaction to the harsh results of the application of pure contributory negligence,¹⁵ which completely barred a plaintiff from recovery when that plaintiff was negligent to any degree.¹⁶ By contrast, comparative negligence allows a plaintiff to recover despite the fact that his negligence contributed to his injury.¹⁷ His award, in most cases, will equal the amount of his damages less the proportional amount of damages attributable to his negligence.¹⁸

Because the intent of comparative negligence is to allocate fault between the plaintiff and the defendant, complete defenses such as assumption of risk have been viewed as inconsistent with this principle.¹⁹ Different jurisdictions have adopted, in general, three separate responses to this concern.²⁰ Eight states have abolished the defense altogether.²¹ Twenty-seven states have eliminated it as a defense to the extent that it is a complete bar. Instead, these states recognize it only as a factor

different jurisdictions' approaches to interplay of assumption of risk and comparative negligence principles).

¹⁴ Jean W. Saxton, Note, 67 TEMP. L. REV. 903, 903 (1994). The only states which have not adopted some form of comparative negligence are Alabama, Maryland, North Carolina, and the District of Columbia. Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121, 123 n.2 (1993).

¹⁵ Hollister, *supra* note 14, at 122-23; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 469 (5th ed. 1984).

¹⁶ Howard J. Alperin, Annotation, *The Doctrine of Comparative Negligence and its Relation to the Doctrine of Contributory Negligence*, 32 A.L.R.3D 463, 488-90 (1970).

¹⁷ Alperin, *supra* note 16, at 472.

¹⁸ *Id.*

¹⁹ PROSSER, *supra* note 3, at 456-57.

²⁰ For an extensive state-by-state analysis, see 57B AM. JUR. 2D *Negligence* §§ 1300-1751 (1989).

²¹ 57B AM. JUR. 2D *Negligence* §§ 1300-1751 (1989). Connecticut, Illinois, Kansas, Kentucky, Massachusetts, Michigan, North Dakota, and Oregon have, at least practically, abolished the defense. *Id.*

in determining the respective fault of the parties.²² Still, fifteen states and the District of Columbia have kept assumption of risk as an independent, viable defense regardless of whether the particular state has adopted comparative negligence principles.²³ Mississippi's approach in this regard does not fall neatly into any of these categories. Indeed, as the next section explains, Mississippi's status in this area is not clearly defined at all.

III. MISSISSIPPI'S LEGISLATIVE AND JUDICIAL TREATMENT OF THE RELATIONSHIP BETWEEN ASSUMPTION OF RISK AND COMPARATIVE NEGLIGENCE

In 1890, the state's recognition of the defense of assumption of risk was evidenced by the state's constitution which abrogated the defense as it would otherwise apply in cases where an employee of a railroad was injured on the job.²⁴ In 1910, the Mississippi Legislature enacted the nation's first comparative negligence statute.²⁵ Its immediate effects were to abolish the strict doctrine of contributory negligence²⁶ and to allow the jury to diminish the plaintiff's recovery "in proportion to the amount of negligence attributable to the person injured."²⁷ This action did not statutorily abolish the doctrine of assumption of risk.²⁸ However, its applicability was limited four years later when the legislature eliminated the defense in

²² *Id.* These states include: Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. *Id.*

²³ *Id.* These states include: Alabama, Delaware, Georgia, Maryland, Mississippi, Nebraska, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia and Pennsylvania. *Id.*

²⁴ MISS. CONST. of 1890, art. 7, § 193.

²⁵ Act of Apr. 16, 1910, ch. 135, 1910 Miss. Laws 125 (codified as amended at MISS. CODE ANN. § 11-7-15 (1972)); KEETON ET AL., *supra* note 15, § 67, at 471.

²⁶ H. Wesley Williams III, 1989 *Tort "Reform" in Mississippi: Modification of Joint and Several Liability and the Adoption of Comparative Contribution*, 13 MISS. C. L. REV. 133, 133 (1992).

²⁷ MISS. CODE ANN. § 11-7-15 (1989).

²⁸ Olger C. Twyner III, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L.J. 563, 574 (1982).

all cases involving an employee's injury due to the negligence of the employer.²⁹ The "master and servant" exception was reinforced in 1948 when the legislature prohibited the use of the defense by an employer in cases where an employee was seeking coverage under the state's worker's compensation statute.³⁰ Moreover, the Mississippi Legislature recently gave an implicit blessing to the defense by incorporating the elements of assumption of risk into the newly enacted products liability statute.³¹ Thus, while the legislature expressed its will by eliminating the complete defense of contributory negligence, it seems apparent that their intention was, and still is, to retain the defense of assumption of risk.

Nevertheless, the suggestion has been raised by at least one commentator that the legislature did, in fact, intend to abolish the defense of assumption of risk when it enacted the 1914 statute.³² This argument is premised on the proposition that, in 1914, when the statute abolishing the defense in master and servant cases was enacted, the only assumption of risk cases in Mississippi had involved a master and servant relationship.³³ Since the legislature abrogated the defense to that

²⁹ Act of Feb. 28, 1914, ch. 156, 1914 Miss. Laws 200 (codified at MISS. CODE ANN. § 11-7-19 (1972)). Essentially, the legislature took the language of § 193 of the state constitution, which abrogated the defense in railroad employee cases, and expanded its application to all cases involving any master and servant. See MISS. CONST. art. VII, § 193. While providing the general rule that assumption of risk shall not be a defense as between master and servant, this statute, like its constitutional counterpart, does except from the rule situations involving injuries to "conductors, or locomotive engineers, in charge of dangerous or unsafe cars or engines voluntarily operated by them." MISS. CODE ANN. § 11-7-19 (1972).

³⁰ See MISS. CODE ANN. § 11-1-63(d) (1994).

³¹ See MISS. CODE ANN. § 11-1-63(d) (1994). Unlike the defense's "master and servant" limitations, the products liability statute codified existing law, since assumption of risk had already been held applicable in products cases. See *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1079 (5th Cir. 1994) (applying doctrine in products case); *Alley v. Praschak Mach. Co.*, 366 So. 2d 661, 665 (Miss. 1979) (applying doctrine in products case).

³² See David E. Wilder, *Assumption of Risk in Mississippi - Time For a Change?*, 44 MISS. L.J. 452, 465-66 (1973).

³³ Wilder, *supra* note 32, at 465. Other commentators have stated that the doctrine of assumption of risk arose from the employer/employee relationship, as a product of the industrial revolution. See John L. Diamond, *Assumption of Risk*

extent in 1914, it is suggested that the defense was abrogated in its entirety at that time.³⁴ According to this argument, the question remains, "[h]ad the legislature known of the future extensions of the assumed risk doctrine, would they have limited it as they limited contributory negligence?"³⁵

This question is the result of a well-reasoned argument, but the argument wrongly assumes that the legislature was unaware that the defense could be used in situations outside of the master and servant context. While it is true that most of the Mississippi cases prior to 1914 limited the defense's application to this context, there are some cases which indicate that the court was at least cognizant of a broader application.³⁶ In fact, the court seemed to directly apply the doctrine in the 1910 case of *Ingram-Day Lumber Co. v. Harvey*,³⁷ which did not involve a master and servant relationship.³⁸ In *Harvey*, the plaintiff had been awarded a judgment against a lumber company, which was not Harvey's employer, as a result of an injury sustained on a logging train.³⁹ The Mississippi Supreme Court reversed the judgment and denied Harvey's recovery, stating that "[w]hen Harvey took passage on the train as he did, he is bound with a knowledge of the character of the road he was taking passage on and assumed the risk."⁴⁰ *Harvey* and the other aforementioned cases indicate that the court

After Comparative Negligence: Integrating Contract Theory into Tort Doctrine, 52 OHIO ST. L.J. 717, 750 n.5 (1991); Spell, *supra* note 3, at 159.

³⁴ Wilder, *supra* note 32, at 465.

³⁵ Wilder, *supra* note 32, at 465.

³⁶ See *Pulliam v. Illinois Cent. R. Co.*, 23 So. 359, 360 (Miss. 1898) (distinguishing contributory negligence from "voluntary, deliberate, willful, reckless exposure of one's self to injury" in non-master/servant case); *Alabama & V. Ry. v. Jones*, 19 So. 105, 107 (Miss. 1895) (making same distinction in another non-master/servant case); *Dix v. Brown*, 41 Miss. 131, 136 (1866) (stating general rule in non-master/servant case, "that no one can maintain an action for a wrong where he has consented . . . to the act which occasions his loss.").

³⁷ 53 So. 347 (Miss. 1910).

³⁸ *Harvey*, 53 So. at 347.

³⁹ *Id.* at 348. Harvey was seeking employment at the time of his injury, but he was held not to be employed at the time. *Id.* The logging train, which was in an obvious state of disrepair, was not meant for passengers. *Id.*

⁴⁰ *Id.*

recognized that the doctrine of assumption of risk applied outside of the context of master and servant cases.

There are two explanations for the fact that only a few cases during this period acknowledged a broader application of the doctrine. First, the majority of the negligence cases prior to 1914 involved a master and servant relationship. Therefore, except for *Harvey* and the other non-master and servant cases mentioned above, the only cases to which the doctrine could be applied were master and servant cases. Secondly, because, prior to 1910, contributory negligence had the same effect as assumption of risk in totally barring recovery, but required a lesser showing, it was only natural that the defense of assumption of risk was seldom litigated during this era.⁴¹ For these reasons, the suggestion that the Mississippi Legislature intended to abolish the doctrine of assumption of risk when it enacted the 1914 statute is untenable.

A. Mississippi's Judicial Treatment Before 1973

Unlike the legislature's consistent treatment of the defense of assumption of risk, the Mississippi Supreme Court has had more difficulty in defining its applicability. Until 1973, however, the court was largely consistent in its position, repeatedly maintaining that the defense of assumption of risk and comparative negligence were independently applicable doctrines.⁴² During this period, the assumption of risk instruction was routinely given whenever the facts at issue supported the elements of the defense. The 1947 decision of *Saxton v. Rose*⁴³ il-

⁴¹ The proposition that the doctrine's application exceeded the master and servant area in 1914 is also supported by the fact that cases rendered shortly thereafter recognized a broader application. See *McDonald v. Wilmut Gas & Oil Co.*, 176 So. 395, 397 (Miss. 1937) (applying assumption of risk in premises liability action and stating "[t]he common-law doctrine of assumption of risk is in full force in this state, except as between master and servant."); *Lucas v. Hammond*, 116 So. 536, 537 (Miss. 1928) (recognizing elements of assumption of risk in premises liability case, but not applying them since defendant was relieved of liability on other grounds).

⁴² But see *Wilder*, *supra* note 32, at 467-70 (arguing existence of rare instances of inconsistent application of doctrine prior to 1973).

⁴³ 29 So. 2d 646 (Miss. 1947).

lustrates the court's position during this period. In *Saxton*, the decedent's widow brought a wrongful death action against the driver of the car in which the decedent was killed while riding as a passenger.⁴⁴ The question before the court was whether the trial court erred in applying the assumption of risk doctrine and not contributory negligence.⁴⁵ After distinguishing the two defenses,⁴⁶ the court noted that the case was squarely one of assumption of risk and affirmed the trial court's judgment in favor of the defendant.⁴⁷ *Griffin v. Holliday*,⁴⁸ a 1970 case similar to *Saxton*,⁴⁹ indicated that the court had not changed its mind during the interim twenty-three years.⁵⁰ Two years later, in *Herod v. Grant*,⁵¹ the court held that the doctrine was

⁴⁴ *Saxton*, 29 So. 2d at 647. The plaintiff alleged that the driver was grossly negligent in driving while intoxicated. *Id.* Evidence elicited at trial indicated that the decedent/passenger knew that the driver was intoxicated when he entered the car. *Id.*

⁴⁵ *Id.* at 648.

⁴⁶ *Id.* at 648-49. The court noted that assumption of risk "applies when a party voluntarily and knowingly places himself in such a position, or submits himself to such a condition, appreciating that injury to himself on account thereof is liable to occur at any and all times so long as such a position or condition continues." *Id.* at 649. In contrast, the court stated that contributory negligence applies when "the injured person, by his own conduct has done something, or has omitted to do something, which contributes to the particular event, and at the particular time and place, which was the immediate cause of the injury." *Id.* The court summarized the distinction by defining assumption of risk as the "venturousness" of the injured person while contributory negligence was defined as his "carelessness." *Id.*

⁴⁷ *Id.* at 649-50.

⁴⁸ 233 So. 2d 820 (Miss. 1970).

⁴⁹ *Griffin*, 233 So. 2d at 822. In this case, the defendant/driver and the plaintiff/passenger drove thirty-five miles to a bar with the intention to drink beer. *Id.* After remaining at the bar for two hours, consistent with their intentions, they began their return trip home. *Id.* On their way home, the vehicle overturned, resulting in the plaintiff's injuries. *Id.*

⁵⁰ *Id.* After a jury verdict for the defendant, the plaintiff appealed, assigning as error the instruction regarding assumption of risk. *Id.* While the court did reverse the decision of the lower court, it found error only in the phrasing of the instruction which applied a reasonable man standard instead of a subjective one. *Id.* The court did not find error in the applicability of the doctrine to the facts at bar. *Id.* Rather, it reinforced the court's position on the defense by stating that "the basic issue in the case [was] whether [the] plaintiff should be denied recovery of damages because he assumed the risk." *Id.* at 823.

⁵¹ 262 So. 2d 781 (Miss. 1972).

applicable in a case where the plaintiff was injured while hunting in a seated position on top of a tool box in the back of a moving truck.⁵² *Herod* marked the end of the court's consistent treatment of the defense as an independent doctrine entirely separate from contributory negligence.

B. The "Overlap" Rule of Braswell v. Economy Supply

Many scholars, practitioners, and jurists have opined that the doctrine of assumption of risk is inconsistent with the fault-apportioning system of comparative negligence.⁵³ In 1973, the landmark decision of *Braswell v. Economy Supply Co.*⁵⁴ demonstrated that the Mississippi Supreme Court was somewhat persuaded by this argument. In *Braswell*, the court addressed the propriety of submitting jury instructions on both assumption of risk and contributory negligence.⁵⁵ The court held that "where assumption of risk *overlaps and coincides* with contributory negligence the rules of the defense of contributory negligence shall apply."⁵⁶ The court reversed the jury's defense verdict and remanded for a new trial, finding error in the court's instruction on the defense of assumption of risk.⁵⁷

⁵² *Herod*, 262 So. 2d at 782. Assigned as error in *Herod* was the trial court's refusal to grant the defendant's motion for a directed verdict based on the defense of assumption of risk. *Id.* at 783. Finding that the trial court committed error in this respect, the Mississippi Supreme Court reversed the jury's award in favor of the plaintiff. *Id.*

⁵³ *Bryant v. Nealey*, 599 F. Supp. 248, 249-50 (N.D. Miss. 1984). See generally Annotation, *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk*, 16 A.L.R.4TH 700, 703; 57B AM. JUR. 2D *Negligence* §§ 1201-06 (1989).

⁵⁴ 281 So. 2d 669 (Miss. 1973).

⁵⁵ *Braswell*, 281 So. 2d at 673. Braswell was injured by some falling lumber while on the defendant's property. *Id.* at 670. Braswell alleged that his injury was caused by the defendant's negligence in stacking the lumber. *Id.* The defendant denied liability, arguing that Braswell's own negligence in climbing the stack was the cause of his injuries and that Braswell "assumed the risk of entering the bin where the lumber was stacked." *Id.*

⁵⁶ *Id.* at 677 (emphasis added). Earlier in the same year that *Braswell* was decided, the Mississippi Supreme Court implied that there is no overlap between the two defenses. See *Shurley v. Hoskins*, 271 So. 2d 439, 443 (Miss. 1973) (stating "[i]t should . . . be pointed out that these two doctrines are separate, distinct, and not to be mistaken for one another.").

⁵⁷ *Braswell*, 281 So. 2d at 678.

Before announcing its holding, the court quoted a large portion of text written by Prosser.⁵⁸ Prosser, in discussing the disfavoring of the defense of assumption of risk in Federal Employer Liability Act cases, suggested that the same rationale should apply under state laws which apportion damages according to fault.⁵⁹ "[W]hile contributory negligence went only to reduce the plaintiff's damages, assumption of risk remained as a complete defense, which barred the action entirely. . . . *In all probability this defeats the basic intention of the statute. . . .*"⁶⁰ In apparent agreement with this logic, but without discussing whether assumption of risk offends the intent of Mississippi's comparative negligence law, the court eliminated assumption of risk to the extent that it overlapped and coincided with comparative negligence.⁶¹

Braswell seemed to indicate that the defense of assumption of risk would be significantly limited in application by precluding the defendant from submitting an instruction on assumption of risk whenever both defenses were applicable. Unfortunately, the *Braswell* court did not provide enough guidance for identifying exactly when the limitation was triggered.⁶² As a result, application of *Braswell's* holding has been somewhat problematic.

Since *Braswell* was decided, there have been several published Mississippi Supreme Court and federal court decisions

⁵⁸ *Id.* at 676-77.

⁵⁹ *Id.*

⁶⁰ *Id.* at 676 (quoting PROSSER, *supra* note 3, at 456-57) (emphasis added).

⁶¹ *Id.* at 677. Instead of giving deference to this State's historical treatment of the two defenses, the court seemed to rely mainly on the fact that "[t]he doctrine of assumption of risk has been under attack in many jurisdictions and has been brought into sharp focus in those jurisdictions which, like Mississippi, have comparative negligence statutes apportioning damages between plaintiff and defendant." *Id.* at 676.

⁶² Moreover, the "overlap" test, which seems to require a substantive analysis of the facts, may be subject to a procedural flaw. Contributory negligence and assumption of risk are affirmative defenses which must be pleaded in order to be available for the defense in the form of jury instructions. MISS. R. CIV. P. 8(c). While the issue has not been litigated, a defendant could conceivably avoid *Braswell's* overlap analysis by pleading only assumption of risk, arguing that the two defenses could not then overlap since only one is available.

discussing the interplay of assumption of risk and comparative negligence. Several other cases omit any mention of *Braswell's* rule, even where both defenses would seem applicable. The language of these collective opinions is often contradictory and confusing.

Singleton v. Wiley,⁶³ which was decided only six years after *Braswell*, best illustrates the court's confusion in this area. In *Singleton*, the court affirmed the trial court's granting of an assumption of risk instruction in a case involving a high-school student who was injured after jumping on the trunk of the defendant's moving car.⁶⁴ In discussing *Braswell*, the court completely misstated *Braswell's* rule, holding that "[t]his is one of those rare cases where the doctrines of comparative negligence and assumption of risk appear to overlap, and where instructions on both could be given."⁶⁵ Moreover, the court seemed to justify assumption of risk instructions in two different situations: whenever the plaintiff's conduct was venturous and whenever the plaintiff's conduct was the sole proximate cause of his injuries.⁶⁶ Because of *Singleton's* obvious analytical flaws, that case provides little help in determining the court's approach in applying *Braswell's* rules. Other cases have been clearer, however, revealing that four general approaches have been used by Mississippi's courts in attempting to follow *Braswell*.⁶⁷

One approach taken was to allow an instruction on assumption of risk only when the facts indicated that the

⁶³ 372 So. 2d 272 (Miss. 1979).

⁶⁴ *Singleton*, 372 So. 2d at 273-75.

⁶⁵ *Id.* at 274. The erroneous statement seems to have been predicated on a faulty reading of *Braswell's* analysis. In discussing *Braswell*, the court quoted the language of the opinion which expressed a concern over the applicability of both defenses. *Id.* at 275. The court then said, "[h]owever, in *Braswell*, we did go on to say: 'The doctrine of assumption of risk was properly applied to the unusual facts of this case and it represents one of the rare instances where it is applicable.'" *Id.* This quoted language from *Braswell* was actually referring to the case of *Herod v. Grant*, and not to the facts of *Braswell*, wherein the instruction was, of course, disallowed. *Braswell*, 281 So. 2d at 675.

⁶⁶ *Singleton*, 372 So. 2d at 275.

⁶⁷ As will be shown below, the Mississippi Supreme Court has used all four of these approaches since 1973.

plaintiff's actions evidenced "venturousness" on his part. In *Richardson v. Clayton & Lambert Mfg. Co.*,⁶⁸ the only case that has attempted to define the "overlap" of the two defenses, the Federal District Court for the Northern District of Mississippi required a separate element of "venturousness."⁶⁹ In defining the overlap, the court stated:

If the circumstances show that the plaintiff may have assumed the risk but also indicate that the plaintiff may have been negligent without assuming the risk, then the two doctrines overlap, and only the comparative negligence instruction should be given. In such a case an instruction on assumption of risk should not be given unless the court finds that the circumstances of the case qualify the case as one of those rare cases where the plaintiff's conduct is deemed to be venturous.⁷⁰

Richardson suggests that venturousness is a requirement, separate from the traditional elements of the defense, which must be present before the instruction can be allowed. Later cases have impliedly rejected this rationale, finding venturousness to be an implicit characteristic embodied in the normal three-element definition of the defense.⁷¹

Richardson's approach is largely predicated on *Yarbrough v. Phipps*,⁷² a 1973 Mississippi Supreme Court decision. In *Yarbrough*, the court reversed the trial court's defense verdict

⁶⁸ 657 F. Supp. 751 (N.D. Miss. 1987).

⁶⁹ *Richardson*, 657 F. Supp. at 754. *Richardson* involved a plaintiff who was injured after diving into a pool. *Id.* at 752.

⁷⁰ *Id.* at 754. The quoted language seems to be inconsistent, since it first prohibits the granting of an assumption of risk instruction where the defined overlap occurs, but then provides that the instruction may nonetheless be proper if venturousness is found.

⁷¹ See *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1078-79 n.26 (5th Cir. 1994) (stating that venturous distinction between assumption of risk and contributory negligence is reflected by Mississippi's definition of elements of assumption of risk); *Huffman v. Walker Jones Equip. Co.*, 658 So. 2d 871, 874 (Miss. 1995) (stating "[t]he injured party's conduct must rise to a level of venturousness, as opposed to carelessness, with regards to appreciation of the known peril"); see also *infra* notes 103, 104 and accompanying text.

⁷² 285 So. 2d 788 (Miss. 1973).

on the ground that the assumption of risk instruction was too indefinite.⁷³ Specifically, the instruction failed to include the third element of the defense, which requires a voluntary and deliberate choice to expose one's self to danger.⁷⁴ The court concluded that because the third element was missing, the instruction lacked an element of venturous conduct on the part of the plaintiff.⁷⁵ Finally, the court stated that, upon retrial, no assumption of risk instruction should be given, because the evidence did not support the requisite finding of venturousness.⁷⁶ Apparently, the district court in *Richardson* focused only on this last statement, interpreting it to require a separate element of venturousness, in addition to the regular three-element test.

A second approach, though never actually applied, was suggested by the Mississippi Supreme Court in *Alley v. Praschak Machine Co.*⁷⁷ In this products liability action, the court stated in a footnote that assumption of risk is applicable only when the plaintiff's negligence was the sole proximate cause of the accident.⁷⁸ After apparently finding that to be the situation in *Alley*, the court affirmed the trial court's granting of the instruction.⁷⁹ The obvious problem with this approach is that it effectively abolishes the doctrine of assumption of risk.⁸⁰

⁷³ *Yarbrough*, 285 So. 2d at 790-91.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 366 So. 2d 661 (Miss. 1979).

⁷⁸ *Alley*, 366 So. 2d at 665 n.1. In *Alley*, the plaintiff's arm was amputated while working on a machine built by the defendant. *Id.* at 663. The plaintiff sued under theories of strict liability and negligence. *Id.*

⁷⁹ *Id.* at 665.

⁸⁰ The fact that such an approach is tantamount to abrogation of the defense is evidenced by Justice Lee's statement that in such a case the issue of sole proximate cause "should be submitted to the jury rather than assumption of risk." *Id.* at 665 n.1. The origin of this approach may come from the *Braswell* opinion, wherein the court added that "[t]his [overlap] rule does not prevent a defense on the ground that a plaintiff's injury was caused by his negligence, if his negligence was the sole proximate cause of the injury." *Braswell*, 281 So. 2d at 677 (emphasis in original).

The Mississippi Supreme Court applied a third approach in *Nichols v. Western Auto Supply*.⁸¹ In another products case, the court suggested that assumption of risk is an available defense whenever the facts of the case can be distinguished from *Braswell*.⁸² The court indicated that, since *Braswell* involved premises liability and the case at bar was a products liability case, *Braswell*'s rule was inapplicable.⁸³ The court discussed *Alley* in apparent support of this approach.⁸⁴ Of course, the problem with this approach is that *Braswell* did not limit its holding to its facts, or to premises liability cases in general.⁸⁵

The final and most popular approach has surfaced in the majority of post-*Braswell* assumption of risk cases. Under this approach, assumption of risk is applicable whenever the elements can be satisfied despite *Braswell*'s holding. In two Mississippi Supreme Court cases, *McLeod v. Whitten*⁸⁶ and *McDaniel v. Ritter*,⁸⁷ the majority opinions omit any discussion of *Braswell*'s rule.⁸⁸ In *McLeod*, the court analogized the facts to *Herod v. Grant*,⁸⁹ a pre-*Braswell* case, and affirmed the defense verdict.⁹⁰ In *McDaniel*, the court, sitting en banc

⁸¹ 477 So. 2d 261 (Miss. 1985).

⁸² *Nichols*, 477 So. 2d at 263. In *Nichols*, the appellant, citing *Braswell*, argued that the lower court erred in granting an instruction on assumption of risk without granting one on comparative negligence. *Id.*

⁸³ *Id.* The court held that the doctrine of assumption of risk is applicable in cases involving strict liability. *Id.* at 264.

⁸⁴ *Id.* at 263-64. In an apparent response to the questionable viability of the defense, the court stated "[r]egardless of the feeling of attorneys and judges on assumption of risk, the doctrine has not been abolished in Mississippi and . . . [the instruction] properly submitted the question to the jury." *Id.* at 264.

⁸⁵ See *Braswell*, 281 So. 2d at 677; see also *supra* note 56 and accompanying text.

⁸⁶ 413 So. 2d 1020 (Miss. 1982).

⁸⁷ 556 So. 2d 303 (Miss. 1989).

⁸⁸ While the majority opinion in *McDaniel* omitted any discussion of *Braswell*, Justice Sullivan dissented separately. See *McDaniel*, 556 So. 2d at 319-21 (Sullivan, J., dissenting). In his opinion, Justice Sullivan discussed *Braswell* at length and called for the abolition of the defense. *Id.* at 319-20 (Sullivan, J., dissenting).

⁸⁹ See *supra* notes 51, 52 and accompanying text.

⁹⁰ *McLeod*, 413 So. 2d at 1022-24. Oddly, the court did find error in the in-

and with only one judge dissenting, affirmed the circuit court's granting of a new trial based on the court's erroneous submission of an assumption of risk instruction.⁹¹ The court did not base its decision on *Braswell*, finding only that the evidence at trial did not support the knowledge element of the assumption of risk defense.⁹² Other Mississippi cases reveal that Mississippi courts rarely apply *Braswell*'s rule, instead choosing to base the applicability determination solely on whether the evidence supports the elements of the defense.⁹³

Federal courts, in applying Mississippi law, have also followed this approach of applying assumption of risk whenever the facts support the elements of the defense.⁹⁴ In *Bryant v. Nealey*,⁹⁵ the Federal District Court for the Northern District of Mississippi discussed *Braswell* at length.⁹⁶ The court noted

struction, stating that the instruction should have required the jury to find that the defendant acted without negligence. *Id.* at 1023. Because the jury returned a verdict in favor of the defendant and included the language "[n]ot guilty of negligence," the court found the error harmless. *Id.* at 1023-24.

⁹¹ *McDaniel*, 556 So. 2d at 316. The circuit court refused the plaintiff's instruction on comparative negligence, but granted the defendant's assumption of risk instruction. *Id.* at 314. After a jury returned a verdict for the defendant, the circuit court found that it should not have submitted the issue of assumption of risk to the jury. *Id.* at 304.

⁹² *Id.* at 314-15. The court stated that the trial record only raised an issue of the plaintiff's negligence and that the evidence did not satisfy the elements of the assumption of risk defense. *Id.* at 315-16.

⁹³ See *Huffman v. Walker Jones Equip Co.*, 658 So. 2d 871, 874 (Miss. 1995) (reversing summary judgment where evidence did not support finding that plaintiff appreciated specific risk involved); *Sugg v. Sanderson*, 515 So. 2d 909, 911 (Miss. 1987) (finding evidence supported instruction); *Edwards v. Ellis*, 478 So. 2d 282, 288-89 (Miss. 1985) (affirming decision to refuse instruction where evidence did not support finding of elements); *Munford v. Peterson*, 368 So. 2d 213, 218 (Miss. 1979) (noting that evidence did not support instruction); *Mississippi Power & Light Co. v. Shepard*, 285 So. 2d 725, 740-41 (Miss. 1973) (holding that evidence did not support instruction).

⁹⁴ Of the six federal decisions discussing this area of Mississippi law, only *Richardson* follows a different approach. See *supra* notes 68-70 and accompanying text.

⁹⁵ 599 F. Supp. 248 (N.D. Miss. 1984).

⁹⁶ *Bryant*, 599 F. Supp. at 250. In *Bryant*, the district court denied the defendant's motion for summary judgment, stating that there was a genuine issue of material fact as to whether the plaintiff was an employee of the defendant. *Id.* at 251. As noted earlier, such a relationship would preclude the applicability of

a commentator's suggestion that *Braswell's* "overlap" consisted of situations in which the plaintiff unreasonably encountered a known risk.⁹⁷ The court then rejected this analysis, stating that "later cases have not interpreted *Braswell* in this manner and have uniformly allowed standard assumption of the risk instructions where there was evidence that the plaintiff voluntarily encountered a known risk."⁹⁸

Likewise, the Fifth Circuit Court of Appeals has consistently applied pre-*Braswell* law in resolving issues of conflict between assumption of risk and comparative negligence. In *Little v. Liquid Air Corp.*,⁹⁹ a products liability action, the Fifth Circuit affirmed the district court's granting of summary judgment in favor of the defendant.¹⁰⁰ The court noted that the appellant did not sufficiently raise the issue of whether the district court erred in applying assumption of risk when it granted summary judgment on the plaintiffs' strict liability claims.¹⁰¹

the assumption of risk defense. See MISS. CODE ANN. § 11-7-19; *supra* note 29 and accompanying text. Nevertheless, the court plainly indicated that it would have applied the defense absent this issue. *Bryant*, 599 F. Supp. at 250. It is interesting to note that Judge Biggers did not have to discuss *Braswell* and its effect, or lack thereof, on subsequent cases, since the statutory prohibition was the dispositive factor in his decision. See *Bryant*, 599 F. Supp. at 250-51 (recognizing that case supported assumption of risk instruction but denying summary judgment due to possible employment relationship between parties).

⁹⁷ *Id.* at 250 (citing *Twynier*, *supra* note 28, at 576-77).

⁹⁸ *Id.* The court cited *McGowan*, *Singleton*, and *Alley* as cases in which, despite the rule in *Braswell*, the Mississippi Supreme Court allowed assumption of risk instructions where the evidence supported the defense's elements. *Id.* (citing *McGowan*, 419 F. Supp. at 746; *Singleton*, 372 So. 2d at 274-75; *Alley*, 366 So. 2d at 665).

⁹⁹ 37 F.3d 1069 (5th Cir. 1994).

¹⁰⁰ *Little*, 37 F.3d at 1079. In *Little*, two wrongful death actions were filed on behalf of welders who died as a result of an explosion which occurred after one of them lit a cigarette near a leaky gas hose. *Id.* at 1071. The plaintiffs sued the gas manufacturer and retailer under theories of strict liability and negligence. *Id.* at 1078 n.26. The district court granted summary judgment in favor of the defendants on both claims, finding that the decedents' failure to evacuate and the lighting of the cigarette were superseding causes which relieved the defendant of liability with regard to the negligence claim. *Id.* Moreover, the district court granted summary judgment on the strict liability claim, finding that the plaintiffs assumed the risk of their injury. *Id.*

¹⁰¹ *Id.* at 1071. The court noted that the plaintiffs waived any challenge to the application of assumption of risk. *Id.* at 1079 n.26.

Nevertheless, the court, sitting en banc, approved the district court's action in this regard, noting that the Mississippi Supreme Court reaffirmed the doctrine of assumption of risk in *McDaniel*, despite *Braswell*'s language to the contrary.¹⁰² In addressing the alleged conflict between the defenses of assumption of risk and contributory negligence, the court stated:

To the extent that contributory negligence and assumption of the risk are distinguished by degree, contributory negligence crosses the pale into assumption of risk when the plaintiff's conduct is not merely negligent - or even grossly negligent - but instead, the plaintiff's conduct is a wilful, venturous challenge to a fully-appreciated danger to his own self-interest and safety. *This distinction is reflected by Mississippi's definition of the elements of assumption of risk. . . .*¹⁰³

Thus, the Fifth Circuit is of the opinion that, while venturousness may be the distinguishing factor which removes assumption of risk from any overlap with comparative negligence, the finding of venturousness is satisfied whenever the elements of the defense are supported by the facts.¹⁰⁴ This opinion is in harmony with the current trend of allowing the defense of assumption of risk to be applicable whenever the circumstances support the elements of the defense, though seemingly contrary to the holding in *Braswell*.

¹⁰² *Id.* at 1078 n.26. The court stated:

Assumption of the risk is a valid defense under Mississippi law. Notwithstanding the sometime musings of the Mississippi Supreme Court concerning the continued vitality of the defense in the light of contributory negligence and Mississippi's adoption of comparative fault, the doctrine has been reaffirmed in unequivocal terms, and actually extended to apply to products liability cases.

Id. (citations omitted).

¹⁰³ *Id.* at 1078-79 n.26 (emphasis added).

¹⁰⁴ See *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1223-24 (5th Cir. 1984) (acknowledging applicability of defense if supported by evidence and holding that knowledge element may be satisfied by circumstantial evidence showing that plaintiff must have known existence of dangerous condition).

IV. ELIMINATING THE CONFUSION ENGENDERED BY *BRASWELL*

While most of the recent assumption of risk cases have effectively ignored, or impliedly rejected, *Braswell's* "overlap" analysis, *Braswell* has not been overruled. Moreover, as discussed above, the Mississippi Supreme Court has applied four separate approaches to the assumption of risk / comparative negligence dilemma. In short, confusion abounds in this area of law, and a uniform rule would be welcome. One method of eliminating the confusion would be to abolish the doctrine of assumption of risk altogether. A more prudent solution would be for the Mississippi Supreme Court to overrule *Braswell*. An analysis of these two alternatives follows.

A. *Why Abrogation of the Defense is not the Answer*

Several jurisdictions, when presented with the supposed conflict between the principles of comparative negligence and assumption of risk, have opted to abrogate the latter defense.¹⁰⁵ There have been hints that the Mississippi Supreme Court is leaning in that direction. For instance, the court recognized a supposed conflict between the two defenses in *Hill v. Dunaway*,¹⁰⁶ wherein Justice Robertson stated that "there is some movement in other states toward elimination of the strict doctrine of assumption of risk."¹⁰⁷ In his dissent in *McDaniel v. Ritter*,¹⁰⁸ Justice Sullivan stated that the court was "waiting for the right case to once and for all abolish the doctrine of assumption of the risk and treat all fault under the comparative negligence statute."¹⁰⁹ More recently, Justice McRae, in

¹⁰⁵ Annotation, *supra* note 53, at 703; 57B AM. JUR. 2D *Negligence* § 1202 (1989).

¹⁰⁶ 487 So. 2d 807 (Miss. 1986).

¹⁰⁷ *Hill*, 487 So. 2d 807, 810 n.1. This recognition of the national trend apparently did not represent Justice Robertson's view of the defense's viability. See *Elam v. Pilcher*, 552 So. 2d 814, 820 (Miss. 1989) (Robertson, J., dissenting) (stating "[i]ndeed, in extreme circumstances, such action on the part of a voluntary passenger [of a car driven by a visibly intoxicated driver] can constitute assumption of risk").

¹⁰⁸ 556 So. 2d 303 (Miss. 1989).

¹⁰⁹ *McDaniel*, 556 So. 2d at 320 (Sullivan, J., dissenting).

writing his dissent to the original *Tharp v. Bunge Corp.*¹¹⁰ opinion, stated that "assumption of the risk is synonymous with open and obvious."¹¹¹ On rehearing, Justice McRae's majority opinion abolished the defense of "open and obvious," thereby foreshadowing the demise of assumption of risk.¹¹² Despite these statements of impending doom, case after case has reiterated that the defense of assumption of risk remains viable in Mississippi.¹¹³

Obviously, these conflicting viewpoints are a reaction to the confusion created by *Braswell*. However, the argument that the doctrine of assumption of risk is inconsistent with principles of comparative negligence cannot be made in a vacuum. When discussing the relationship between these two doctrines, the argument must be made against the backdrop of the particular jurisdiction's legislative and judicial history with respect to this area of the law. While abrogation of assumption of risk may be an easy way to clean-up the confusion, electing that

¹¹⁰ No. 90-CA-1160 (Miss. Sept. 2, 1993), *withdrawn on reh'g*, 641 So. 2d 20 (Miss. 1994).

¹¹¹ *Tharp*, No. 90-CA-1160, at 3 (McRae, J., dissenting). While the defenses of "open and obvious" and "assumption of risk" may have some similarities, they are not synonymous doctrines. Unlike the subjective standard employed in assumption of risk analyses, the test for "open and obvious" requires an objective analysis. See *Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162, 166 (5th Cir. 1992) (applying Mississippi law and defining open and obvious as "apparent and obvious to a casual observer.") (quoting *Harrist v. Spencer-Harris Tool Co.*, 140 So. 2d 558, 561 (Miss. 1962)) (emphasis omitted).

¹¹² *Tharp v. Bunge Corp.*, 641 So. 2d 20, 25 (Miss. 1994). Nevertheless, even if the two defenses were actually synonymous, then "open and obvious" should have been retained since assumption of risk remains as a viable doctrine in Mississippi. Until just recently, Mississippi defendants in premises liability action could avail themselves of the defense of "open and obvious." See Sara Falkinham, Note, *The "Open and Obvious" Defense is No Longer a Complete Bar to Plaintiff Recovery*, 64 MISS. L.J. 241, 251 (1994).

¹¹³ See, e.g., *Little*, 37 F.3d at 1078 n.26 (reiterating viability "[n]otwithstanding the sometime musings of the Mississippi Supreme Court"); *Bryant*, 599 F. Supp. at 250 (recognizing confusion created by *Braswell*); *Nichols*, 477 So. 2d at 264 (finding no error in jury instructions on doctrine). But see *Byrd v. Matthews*, 571 So. 2d 258, 259 (Miss. 1990) (stating "this Court is cognizant of the seemingly-unquestionable viability of the assumption-of-risk doctrine in actions involving a 'sports' injury and the questionable viability of the doctrine in actions involving a non-'sports' injury").

solution is inappropriate if premised on the proposition that the defense is inconsistent with Mississippi's comparative negligence statute. This is so for three reasons.

First, despite language in *Braswell* to the contrary, the doctrine of assumption of risk is facially consistent with the comparative negligence statute.¹¹⁴ Unlike comparative negligence which employs a reasonable man standard, the doctrine of assumption of risk focuses on the *subjective* knowledge and conduct of the plaintiff.¹¹⁵ Assumption of risk can not be used as a mere factor in determining the respective negligence of the parties, since negligence is measured by an objective standard.¹¹⁶ In assessing whether an injured party assumed the risk, the conduct "must be judged in the light of his own knowledge rather than what he 'should have known.'"¹¹⁷ Most of the states that use assumption of risk as a factor in determining the relative fault of the parties have a "comparative fault" system of apportioning damages.¹¹⁸ Unlike these states, Mississippi's statute requires a comparison of negligence, not fault.¹¹⁹ Therefore, the Mississippi statute is not offended

¹¹⁴ *Braswell*, 281 So. 2d at 677. In *Braswell*, the Mississippi Supreme Court partially predicated its holding on the supposed facial inconsistency between assumption of risk and Mississippi's comparative negligence statute. *Id.*

¹¹⁵ See *Saxton v. Rose*, 29 So. 2d 646, 649 (Miss. 1947) (distinguishing assumption of risk from contributory negligence).

¹¹⁶ Annotation, *supra* note 53, at 703.

¹¹⁷ *Alexander*, 731 F.2d at 1224; see also *Huffman v. Walker Jones Equip Co.*, 658 So. 2d 871, 874 (Miss. 1995) (noting comparative negligence application to situations involving plaintiff's carelessness as opposed to venturousness); *Griffin v. Holliday*, 233 So. 2d 820, 822 (Miss. 1970) (stating "whether the plaintiff assumed the risk depends upon what he knew and appreciated by the subjective standard of the plaintiff himself, not by the objective standard of the reasonable man") (citing *Daves v. Reed*, 222 So. 2d 411, 414 (Miss. 1969)); *Saxton v. Rose*, 29 So. 2d 646, 649 (Miss. 1947) (stating "[a]ssumption of risk' . . . applies when a party voluntarily and knowingly places himself in such a position . . . appreciating that injury to himself on account thereof is liable to occur") (emphasis added). It is clear that a subjective standard, which requires proof of the plaintiff's knowledge, is much more difficult to meet than an objective standard. See *Herod v. Grant*, 262 So. 2d 781, 782-83 (Miss. 1972) (discussing relative difficulty in proving plaintiff's subjective knowledge as opposed to objective analysis) (citing 1 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 64.3 (3d ed. 1965)).

¹¹⁸ See 57B AM. JUR. 2D *Negligence* §§ 1300-1751 (1989).

¹¹⁹ MISS. CODE ANN. § 11-7-15 (1972); see *supra* note 27 and accompanying

when a plaintiff's assumption of risk, which is more than mere negligence, is not compared to the defendant's negligence.

A related argument of facial inconsistency appears in *Richardson*, wherein the Federal District Court for the Northern District of Mississippi attempted to define when assumption of risk and contributory negligence overlap.¹²⁰ In a footnote supporting this definition, the court indicated that Mississippi Code section 11-7-17, which mandates that "[a]ll questions of negligence and contributory negligence shall be for the jury to determine," prohibits the granting of both instructions.¹²¹ The fallacy in this reasoning is that it assumes the jury must determine all issues of negligence, even when such a finding is no longer necessary. For instance, the statute does not preclude the granting of dispositive motions or peremptory instructions in a negligence case, but the granting of such motions or instructions does keep negligence issues away from the jury.¹²² The reason for this is that when a judge makes a determination that the defendant is entitled to dismissal, summary judgment, directed verdict, or judgment notwithstanding the verdict, the judge effectively determines that there is no negligence question for the jury to answer.¹²³ Similarly, when a

text.

¹²⁰ *Richardson*, 657 F. Supp at 754; see *supra* note 70 and accompanying text.

¹²¹ *Id.* at 754 n.2 (emphasis omitted) (quoting MISS CODE ANN. § 11-7-17 (1972)). The court stated that "when an assumption of risk instruction is given, the rule that all questions of negligence should be determined by the jury is in effect ignored." *Id.*; see also *Braswell*, 281 So. 2d at 676 (stating that assumption of risk instructions "deny the jury the right to weigh the respective negligence, if any, of the parties").

¹²² See *Mayor & Bd. of Alderman v. Young*, 616 So. 2d 883, 885 (Miss. 1992) (holding that comparative negligence statute does not preclude instructing jury that plaintiff was not contributorily negligent); *City of Greenville v. Laury*, 159 So. 121, 122 (Miss. 1935) (acknowledging situations where determinations of negligence or absence thereof may be for judge and not for jury). The statute does not prohibit a bench trial in a negligence case, despite the fact that the judge will determine the question of negligence. See *McGowan v. St. Regis Paper Co.*, 419 F. Supp. 742, 743 (S.D. Miss. 1976).

¹²³ *McGee v. Bolen*, 369 So. 2d 486, 493 (Miss. 1979); see also *Little*, 37 F.3d at 1079 n.26 (affirming granting of summary judgment based on assumption of risk); *Young*, 616 So. 2d at 887 (affirming granting of peremptory instruction on contributory negligence); *Holley v. Funtime Skateland S., Inc.*, 392 So. 2d 1135,

judge or jury finds that the plaintiff assumed the risk, the statute is equally unoffended since such a finding is tantamount to a determination that there is no longer a question of negligence for the jury.

Finally, the viability of the defense is consistent with legislative intent. The most common argument used in justifying the abrogation of a complete defense such as assumption of risk is that the viability of the defense is inconsistent with the legislature's intent in enacting a comparative negligence statute.¹²⁴ Indeed, in *Braswell*, the Mississippi Supreme Court quoted Prosser who stated that "[i]n all probability [the assumption of risk defense] . . . defeats the basic intention of the [comparative negligence] statute."¹²⁵ While this may be the case in certain jurisdictions, Mississippi's legislative history proves the contrary. Mississippi's legislature, after enacting the comparative negligence statute, has specifically abrogated the defense as it would apply in certain cases.¹²⁶ Such selective abrogation implies an understanding that the doctrine remains applicable in all other situations. Moreover, perhaps in response to the confusion engendered by *Braswell* and its progeny, the legislature incorporated the elements of the assumption of risk defense into the recently enacted products liability statute.¹²⁷ Therefore, any argument for abrogation based on legislative intent must fail.

B. Why Overruling *Braswell* is the Answer

The doctrine of assumption of risk reflects the state's historical and current attitude concerning a plaintiff's ability to

1138 (Miss. 1981) (affirming directed verdict in favor of defendant on issue of assumption of risk); *Gen. Tire & Rubber Co. v. Darnell*, 221 So. 2d 104, 107-08 (Miss. 1969) (holding that trial court should have granted J.N.O.V. for defendant where plaintiff failed to prove negligence).

¹²⁴ Annotation, *supra* note 53, at 703.

¹²⁵ *Braswell*, 281 So. 2d at 676 (quoting PROSSER, *supra* note 3, at 456-57); see *supra* notes 58-60 and accompanying text.

¹²⁶ See *supra* notes 29, 30 and accompanying text.

¹²⁷ MISS. CODE ANN. § 11-1-63(d) (Supp. 1995); see *supra* note 31 and accompanying text.

recover. Mississippi courts continue to apply the doctrine whenever each of the elements is satisfied,¹²⁸ thus acknowledging that a plaintiff's conduct can be so egregious that he should be denied recovery altogether, even if his actions are not the sole proximate cause of his injury. Moreover, the elected representatives of this state have collectively indicated that this defense is desirable, at least in the area of products liability.¹²⁹

As noted above, assumption of risk is compatible with Mississippi's system of comparative negligence.¹³⁰ Because assumption of risk focuses on the subjective knowledge and behavior of the plaintiff, the defense is separate from the doctrine of comparative negligence. As a separate doctrine where proof of the elements are presented by the defendant, an instruction on the defense should be given to the jury, regardless of any other defenses which may be applicable.

Detractors of assumption of risk disregard the subjective/objective distinction as justification for the defense's application, arguing that comparative negligence principles should apply regardless of whether the plaintiff's actions were intentional or voluntary.¹³¹ However, in disregarding this distinction, and in arguing that comparative negligence principles be applied regardless of the voluntary nature of the plaintiff's actions, this rule of tort law—that individuals must bear full responsibility for their intentional acts means nothing. An example of the practical application of this rule is that most, if not all, jurisdictions recognize that comparative negligence is not a defense to an intentional tort action.¹³² This is so be-

¹²⁸ See *supra* notes 87-104 and accompanying text.

¹²⁹ See *supra* notes 31, 127 and accompanying text.

¹³⁰ See *supra* notes 114-19 and accompanying text.

¹³¹ See David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 LA. L. REV. 1341, 1373 & n.179 (1984) (arguing that maintaining distinction is pointless and should be discontinued).

¹³² See *Graves v. Graves*, 531 So. 2d 817, 819 (Miss. 1988) (affirming rule that defenses of contributory or comparative negligence are not applicable to intentional tort actions); *St. Louis & S.R.R. v. Ault*, 56 So. 783, 785 (Miss. 1911). This rule is applied throughout American jurisdictions. *Graves*, 531 So. 2d at 819; 6 AM. JUR. 2D *Assault and Battery* § 153 (1989).

cause, where a defendant voluntarily chooses to injure another, it is irrelevant that the injured person's negligence may have contributed to his full responsibility for the consequences of his voluntary conduct.¹³³ Because the defendant acts intentionally, he takes full responsibility for the consequences of his voluntary conduct. The defense of assumption of risk is a corollary to this rule, mandating the same result in cases where the conduct at issue is that of the plaintiff's. Where a plaintiff's injury results from his intentional conduct, the plaintiff also must accept full responsibility for the consequences of his actions.¹³⁴ Neither a defendant nor a plaintiff accepts full responsibility for his or her intentional conduct when comparative negligence principles are applied.

Braswell notwithstanding, the fact that any "overlap" may exist between the two defenses should have no bearing on their applicability.¹³⁵ If it is agreed that a plaintiff's voluntary exposure to a known risk should preclude him from recovering, then it does not make sense to allow him to recover because he *also* acted unreasonably. Indeed, "[w]hen one acts knowingly, it is immaterial whether he acts reasonably."¹³⁶ As such, instructions on both defenses should be submitted to the jury in appropriate cases, with the jury applying comparative negligence principles only in the event that it finds the plaintiff did not assume a known risk. This view is consistent with the legislature's intent,¹³⁷ Mississippi common law before *Braswell*,¹³⁸ and the majority of assumption of risk cases following *Braswell*.¹³⁹ Therefore, *Braswell* should be overruled as an aberration of an otherwise consistent aspect of Mississip-

¹³³ KEETON ET AL., *supra* note 15, at 462.

¹³⁴ See *supra* notes 128-29 and accompanying text.

¹³⁵ Because of the fundamental difference in the concepts of negligence and knowledge, at least one court has recognized that there is no such overlap between assumption of risk and comparative negligence. See *Kennedy v. Providence Hockey Club, Inc.*, 376 A.2d 329, 332 (R.I. 1977) (citing *Braswell* with disapproval).

¹³⁶ *Kennedy*, 376 A.2d at 333.

¹³⁷ See *supra* notes 25-41 and accompanying text.

¹³⁸ See *supra* notes 42-52 and accompanying text.

¹³⁹ See *supra* notes 87-104 and accompanying text.

pi personal injury law.¹⁴⁰

V. CONCLUSION

When a person voluntarily consents to expose himself to a known danger, the law of Mississippi does not allow the person to hold another liable for his subsequent injury.¹⁴¹ More egregious than mere negligent behavior, assuming a risk requires knowledge of the existing danger on the part of the plaintiff.¹⁴² Precluding recovery under these circumstances does not offend the comparative negligence statute, since in these circumstances it is immaterial whether the injured party also acted negligently.¹⁴³

In *Braswell v. Economy Supply*, the Mississippi Supreme Court attempted to limit substantially the application of the assumption of risk doctrine.¹⁴⁴ This decision seems to have been rooted wholly in the recognition of the contemporaneous trend of other jurisdictions.¹⁴⁵ *Braswell's* "overlap" rule was created, not against a backdrop of Mississippi's legislative and judicial treatment of the two defenses, but in response to two concerns: 1) that assumption of risk, "[i]n all probability . . . defeats the basic intention of the [comparative negligence] statute,"¹⁴⁶ and 2) that assumption of risk precludes plaintiff recovery while comparative negligence does not.¹⁴⁷ Had the

¹⁴⁰ One commentator has suggested that "[a]ny attempt to dismiss the curious opinion in *Braswell* as an aberration is unsuccessful because the supreme court reiterated [*Braswell's*] apparent incongruities in *Singleton v. Wiley*." Twyner, *supra* note 28, at 577 n.119 (citations omitted). There is no doubt that *Singleton*, with its obvious analytical errors, is even more incongruous than is *Braswell*. See *supra* notes 63-67 and accompanying text. As such, both incongruous decisions should be dismissed as aberrations, in light of the overwhelming contrary judicial history of the assumption of risk doctrine since the rendering of these opinions. See *supra* notes 87-104 and accompanying text.

¹⁴¹ Excepting, of course, situations where an employer's negligence causes the employee's injury. See *supra* notes 29, 30 and accompanying text.

¹⁴² See *supra* notes 3, 4 and accompanying text.

¹⁴³ See *supra* notes 114-19 and accompanying text.

¹⁴⁴ See *supra* notes 56, 62 and accompanying text.

¹⁴⁵ See *supra* note 61 and accompanying text.

¹⁴⁶ *Braswell*, 281 So. 2d at 676 (quoting PROSSER, *supra* note 3, at 456-57).

¹⁴⁷ See *supra* note 114 and accompanying text.

court based its decision on an analysis of Mississippi's legislative intent, instead of Prosser's generalizations, it would have come to the contrary conclusion that both defenses were intended to be independent doctrines.¹⁴⁸

Unfortunately, the court did not come to this conclusion in 1973. Even more unfortunate is that the court failed to provide adequate guidelines for determining exactly when the overlap rule became applicable.¹⁴⁹ As a result, no less than four different approaches have been used by Mississippi's courts in determining when assumption of risk can be applied.¹⁵⁰ However, with the exception of one case, the *Braswell* rule has never been applied to exclude the defense.¹⁵¹ Nevertheless, *Braswell* remains good law, and until it is overruled, the decision will undoubtedly continue to inject confusion into this area of Mississippi tort law.

O. Stephen Montagnet III

¹⁴⁸ See *supra* notes 25-41 and accompanying text.

¹⁴⁹ See *supra* note 62 and accompanying text.

¹⁵⁰ See *supra* notes 67-104 and accompanying text.

¹⁵¹ See *supra* notes 68-71 and accompanying text.

**MISSISSIPPI RULE OF EVIDENCE 609(a)(2):
THE HONEST THIEF?**

I. INTRODUCTION

Suspicion always haunts the guilty mind;
The thief doth fear each bush an officer.¹

A grand jury indicts and charges a Leflore County man, Ivory Lee Pugh, for burglary.² At trial, Pugh takes the stand to testify and subjects himself to cross-examination.³ The prosecution proceeds to cross-examine Pugh:

Q: Did I understand you to say earlier that you wouldn't break into a house with the lights on?

A: I wouldn't break into a house at all.

Q: You wouldn't?

A: No. . . .

In fact, the very court in which Ivory Lee Pugh now sits has twice convicted him for the crime of burglary.⁴ Over the objection of defense counsel, the trial court judge permits the prosecutor to impeach Pugh's untruthful testimony with evidence of his prior convictions.⁵ The jury convicts Pugh, and the court subsequently sentences him to serve ten years as a habitual offender.⁶ Nevertheless, the Supreme Court of Mississippi summarily determines that Pugh's prior acts of stealth were

¹ William Shakespeare, *Henry VI*, Part 3, V.vi.11.

² *Pugh v. State*, 584 So. 2d 781, 782 (Miss. 1991).

³ *Pugh*, 584 So. 2d at 783.

⁴ *Id.* at 783-84.

⁵ *Id.* at 784. Counsel for the defendant argued that if the trial judge were to allow this evidence to come out on cross examination, then any prior conviction would be admissible to impeach the defendant if the cross-examiner strategically phrased his question. *Id.* at 783. Clearly, the court premised its decision on the principles of 609(a), however, and not on the manner in which the cross-examiner elicited the response. *Id.* at 784.

⁶ *Id.* at 782.

neither committed with an element of dishonesty nor deceit bearing on his propensity to testify truthfully and were, accordingly, inadmissible.⁷ Thus, Pugh's conviction is overturned. This comment discusses the judicial inconsistencies produced by the Mississippi Supreme Court's narrow interpretation of crimes of dishonesty when determining the admissibility of prior theft convictions to impeach witnesses pursuant to Mississippi Rule of Evidence 609(a)(2),⁸ and proposes a change readily applicable to both civil and criminal cases.

The admission of prior convictions into evidence invokes discussion of the competing interests of the criminal defendant's presumption of innocence and the need for jurors to receive all information necessary to render a just verdict. While a determination of the witness' veracity serves the latter interest, there are safeguards, discussed in this comment, which protect the former interest. Thus, the automatic admission of crimes which the witness committed in a deceitful manner effectuates the purpose of Rule 609, in both the civil and criminal arenas, without debilitating the primary interests at stake.

II. HISTORY OF IMPEACHING WITNESSES WITH EVIDENCE OF PRIOR CONVICTIONS

The practice of impeaching a witness through the use of prior convictions originated at common law around the seventeenth century when courts disallowed the testimony of those witnesses who had prior criminal convictions.⁹ Proponents of

⁷ *Id.* at 784-86.

⁸ Mississippi Rule of Evidence 609(a) provides:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party or (2) involved dishonesty or false statement, regardless of the punishment.

MISS. R. EVID. 609(a).

⁹ *State v. Burton*, 676 P.2d 975, 983 (Wash. 1984) (Brachtenbach, J., dissent-

disqualifying convicts from testifying predicated their rationale upon the idea that convicts lacked moral character, and thus, the court could not expect a convicted criminal to bear the truth.¹⁰ American courts followed the common law prohibition against convicts testifying until the mid-1800's when, in most jurisdictions, the rule gave way to statutory abolition.¹¹ In 1848 Mississippi statutorily abolished the disqualification of convicted criminals as witnesses.¹²

Remnants of this prohibitory rule remained intact when, in 1975, United States federal lawmakers enacted, with much debate, Rule 609 of the Federal Rules of Evidence.¹³ Effective

ing) (citing Alan E. Ashcraft, *Evidence of Former Convictions*, 41 CHI. B. REC. 303, 304 (1960)), *overruled by* State v. Brown, 761 P.2d 588 (Wash. 1988); *see* Tillman v. State, 606 So. 2d 1103, 1108 (Miss. 1992) (Banks, J., concurring in part, dissenting in part).

¹⁰ 2 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 519, at 726 (1979). Eventually, England statutorily abolished the disqualification of convicts as witnesses, due partly to the efforts of jurists who vigorously challenged the rule as it often deprived innocent witnesses of key testimony. Hossein Nowbar, *Admissibility of Prior Theft Convictions to Impeach Criminal Defendants in Washington State*, 68 WASH. L. REV. 161, 163-64 (1993).

¹¹ Nowbar, *supra* note 10, at 163-64.

¹² MISS. CODE ANN. § 13-1-11 (1972) (original version at ch. 64, art. 12, tit. 8(18) (Hutchinson 1848)). *See generally* Wetzel v. State, 76 So. 2d 188, 192 (Miss. 1954) (noting that "practically all . . . witnesses for both sides were convicts."), *cert. denied*, 350 U.S. 870 (1954). The Mississippi Legislature, however, maintained that prior convictions are admissible to impeach the credibility of a witness and that it is a question for the jury. MISS. CODE ANN. § 1693 (1942). Additionally, there were few, if any, limitations on the admissibility of prior criminal convictions according to Mississippi common law. *See, e.g.,* Baker v. State, 307 So. 2d 545, 546-47 (Miss. 1975); Allison v. State, 274 So. 2d 678, 682 (Miss. 1973); Bendetti v. State, 249 So. 2d 671, 671-72 (Miss. 1971); Dorroh v. State, 90 So. 2d 653, 656 (Miss. 1956); Breland v. State, 73 So. 2d 267, 268-69 (Miss. 1954); Smith v. State, 63 So. 2d 557, 558-59 (Miss. 1954); Scarbrough v. State, 37 So. 2d 748, 750 (Miss. 1948); Hartsfield v. State, 189 So. 530, 533-34 (Miss. 1939).

¹³ FED. R. EVID. 609(a). Federal Rule of Evidence 609(a) provides:

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs

January 1, 1986, the Mississippi Supreme Court adopted the Mississippi Rules of Evidence (MRE), including MRE 609¹⁴ which mirrored Federal Rule of Evidence (FRE) 609, differing only with respect to the discretionary standard established in 609(a)(1).¹⁵ Accordingly, Mississippi retained the notion that the probative value of some convictions always outweighs the attendant prejudice by adopting Rule 609(a)(2) which prescribes a nondiscretionary rule of admissibility for those crimes which involve "*dishonesty or false statement*, regardless of the punishment."¹⁶ The official comment to the Mississippi Rules

its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a).

¹⁴ Order Adopting the Mississippi Rules of Evidence, *reprinted in* MISS. R. CT. 121-22 (West 1995). For purposes of impeachment, MRE 609(a) divides prior convictions into two categories: "felony-grade convictions" and "crimes involving dishonesty and false statement, whether felonies or misdemeanors." MISS. R. EVID. 609 cmt. Prior to the promulgation of the Mississippi Rules of Evidence, Mississippi courts allowed any prior conviction, other than misdemeanor traffic offenses, for the purpose of impeachment. *Id.*; *see, e.g.*, *Wetzel v. State* 76 So. 2d 188, 192 (Miss.), *cert. denied*, 350 U.S. 870 (1954); *Scarbrough v. State* 37 So. 2d 748, 750 (Miss. 1948); *Brown v. State*, 51 So. 273, 274 (Miss. 1910); *Lewis v. State*, 37 So. 497, 497 (Miss. 1904).

¹⁵ MISS. R. EVID. 609 cmt. The Federal standard differentiates between criminal defendants, using the term "accused," and a non-accused "witness" by mandating different balancing tests the court is to apply depending on the classification of the witness. FED. R. EVID. 609(a)(1). Courts must employ the FRE 403 balancing test, whether the probative value of the felony is "substantially outweighed" by the prejudicial effect, where the witness is not the accused and a stricter balancing test, whether the "probative value outweighs [the] prejudicial effect," where the witness is the accused. *Id.*; *see* *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987) (articulating that trial judge must consider following factors when weighing probative value of convictions against prejudicial effect of admission: "(1) the kind of crime involved; (2) when the conviction occurred; (3) importance of the witness' testimony to the case; [and] (4) the importance of the credibility of the defendant") (citing *United States v. Preston*, 608 F.2d 626, 639 n.14 (5th Cir. 1979)).

Mississippi Rule 609(a)(1) also "recognizes that impeachment occurs in civil as well as criminal cases and accordingly" requires the court to determine whether the probative value of admitting the prior conviction outweighs its prejudicial effect on "a party" rather than the "accused." MISS. R. EVID. 609 cmt. (emphasis added); *see* CAROLYN E. STATON, *MISSISSIPPI EVIDENCE*, at 156-57 (3d ed. 1995).

¹⁶ MISSISSIPPI EVIDENCE, *supra* note 15, at 137. Subsequent to the adoption of

clearly indicates that MRE 609(a)(2) is the same as the federal rule and accordingly, is subject to its interpretation.¹⁷ Therefore, a condition precedent to defining the framework of the Mississippi version is a determination of the designs of FRE 609(a)(2).

III. RULE 609(A)(2)

A. *Discovering the Meaning*

FRE 609 is the product of a compromise between two opposing views in Congress.¹⁸ The lawmakers who stood in opposition to the use of a defendant's prior conviction argued that such a practice violated the idea of a criminal defendant's presumption of innocence.¹⁹ This faction qualified its position by limiting the admissibility of evidence of prior convictions, if allowed, to those crimes in the nature of *crimen falsi*.²⁰ On the other hand, proponents of admissibility argued that any illegal conduct was accurate indicia of a witness' credibility,²¹ and exclusion of such evidence would "improperly allow a felon to

the Mississippi Rules of Evidence, the courts retained the pre-rule notion requiring an adjudication of guilt in order for there to be a conviction. *Keyes v. State*, 312 So. 2d 7, 9-10 (Miss. 1975); compare *Henderson v. State*, 403 So. 2d 139, 141 (Miss. 1981) (holding that arrest is not final judgment of guilt) and *Barlow v. State*, 233 So. 2d 829, 832 (Miss. 1970) (holding that censure by grand jury not final judgment) with *Bridges v. State*, 336 So. 2d 1309, 1310 (Miss. 1976) (enunciating proposition that where defendant pled guilty and no final judgment is entered, guilty plea constituted conviction though no adjudication of guilt). But see *White v. State*, 30 So. 2d 894, 896 (Miss. 1947) (withdrawn guilty pleas not admissible for purposes of impeachment).

¹⁷ MISS. R. EVID. 609 cmt.; *Hopkins v. State*, 639 So. 2d 1247, 1250 (Miss. 1993).

¹⁸ H.R. REP. NO. 650, 93d Cong., 2d Sess. 4 (1974), reprinted in 1974 U.S.C.C.A.N. 7075, 7092-96; MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 609.1, at 473 (3d ed. 1991).

¹⁹ See RULES OF EVIDENCE: HEARINGS BEFORE THE SPECIAL SUBCOMMITTEE ON REFORM OF FEDERAL CRIMINAL LAWS OF THE HOUSE COMMITTEE ON THE JUDICIARY, 93d Cong., 1st Sess., Serial No. 2 at 68 (1973) (statement of Congressman David Dennis).

²⁰ See S. REP. NO. 1277, 93d Cong., 2d Sess. 14 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7061.

²¹ See 120 CONG. REC. 1414 (1974) (statement of Congressman Hogan).

appear as a law abiding citizen."²² The resulting congressional compromise purported to balance both concerns by placing those crimes punishable by death or imprisonment in excess of one year under the discretion of the trial court through FRE 609(a)(1)²³ and denoting those crimes which involve dishonesty and false statement as *per se* admissible through the nondiscretionary measure of FRE 609(a)(2).²⁴ The numerous remarks made in the course of congressional floor debate over FRE 609(a)(2) were a precursor to the lack of judicial consensus on the meaning of "dishonesty or false statement" which appears to have transcended policy disagreements on the mere issue of impeachment by prior conviction.²⁵

Thereafter, federal courts latched onto the language of the Conference Committee Report in their definition of the scope of FRE 609(a)(2):

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.²⁶

The majority of the United States Circuit Courts of Appeals have determined that this legislative history of 609(a)(2) does not contemplate theft convictions.²⁷ Indisputably, crimes that

²² Nowbar, *supra* note 10, at 166.

²³ FED. R. EVID. 609(a)(1); see MCCORMICK ON EVIDENCE § 42, at 56 (John W. Strong ed., 4th ed. 1992).

²⁴ See FED. R. EVID. 609(a)(2).

²⁵ See *United States v. Smith*, 551 F.2d 348 (D.C. Cir. 1976).

²⁶ H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7103 (emphasis added).

²⁷ See, e.g., *Linskey v. Hecker*, 753 F.2d 199, 201 (1st Cir. 1985); *United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984) (holding that theft is not crime involving "dishonesty or false statement" unless it was committed in fraudulent or deceitful manner); *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982); *United States v. Ashley*, 569 F.2d 975, 979 (5th Cir.), *cert. denied*, 439 U.S. 853 (1978); *United States v. Seamster*, 568 F.2d 188, 190-91 (10th Cir. 1978); *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir.) (dictum), *cert. denied*, 434 U.S. 867

qualified at common law as *crimen falsi*²⁸ — such as fraud, embezzlement, swindling — are convincing as indicators of veracity.²⁹ To limit judicial examination of a prior conviction, however, to whether the crime is one enumerated in the Conference Committee's report or to whether the theft conviction on its face is in the nature of *crimen falsi* ignores the fact that the crime may well directly reflect on the witness' veracity.³⁰

(1977); *United States v. Smith*, 551 F.2d 348, 364 (D.C. Cir. 1976); *Virgin Islands v. Toto*, 529 F.2d 278, 282 (3d Cir. 1976).

²⁸ The term *crimen falsi* originated under Roman law and included "not only forgery, but every species of fraud and deceit." 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 373, at 515 (16th ed. 1899). The scope of the term was ultimately enlarged to include:

[F]alse swearing, subornation of perjury, forgery, the execution or attestation of any written instrument, conspiracy to cause the death of innocent persons, counterfeiting, and the sale or suppression of testimony. This was the *crimen falsi* of Roman jurisprudence, which, while embracing nearly every species of deceit by whose agency anyone might be prejudiced, or deprived of his rights, was generally synonymous with the fabrication, or fraudulent alteration of documents to which, when not otherwise distinctly specified, it was presumed to refer.

1 S.P. SCOTT, THE CIVIL LAW, at 47 n.1. However, a more recent conception of *crimen falsi* is found in Congressman Hogan's views on the term during Senate floor debate of FRE 609:

Unless one practices in a jurisdiction which has statutorily defined *crimen falsi*, the common law definition of "any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud" is applicable. This definition has been held to include forgery, perjury, . . . obtaining money under false pretenses, *stealing*, moral turpitude, *shoplifting*, intoxication, [and] *petit larceny* . . .

S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7095 (emphasis added).

²⁹ See, e.g., *Altobello v. Borden Confectionery Products, Inc.*, 872 F.2d 215, 216-17 (7th Cir. 1989) (misdemeanor meter tampering); *United States v. Rogers*, 853 F.2d 249, 252 (4th Cir.) (misdemeanor worthless checks), *cert. denied*, 488 U.S. 946 (1988); *United States v. Huddleston*, 811 F.2d 974, 978 (6th Cir.) (failure to file tax return conviction), *aff'd*, 485 U.S. 681 (1987); *United States v. Noble*, 754 F.2d 1324, 1331 (7th Cir.) (prior conviction of counterfeiting), *cert. denied*, 474 U.S. 818 (1985); *United States v. Coats*, 652 F.2d 1002, 1004-05 (D.C. Cir. 1981) (uttering forgery conviction).

³⁰ The Criminal Justice Section of the American Bar Association proposed a revision to FRE 609(a)(2) that would have defined the scope of the rule to include only those crimes which had a statutory element of "untruthfulness or falsehood." EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 147 (David A.

B. Judicial Development of 609(a)(2) in Mississippi

The Mississippi Supreme Court took its first stance on the application of MRE 609(a)(2) to crimes of theft³¹ when it reversed a trial court's holding which allowed evidence of two prior burglary convictions to impeach a defendant in *Townsend v. State*.³² Aligning itself with the majority of the federal

Schlueter ed., 2d ed., 1991). This version of 609(a), as proposed, provided:

(a) General Rule.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime:

(1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect; or

(2) involved untruthfulness or falsification, regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice. This subsection (2) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification.

Id. at 148 n.27. *But see* United States v. Papia, 560 F.2d 827, 847-48 (7th Cir. 1977) (recognizing that modern theft statutes may encompass criminal conduct that falls within parameters of FRE 609(a)(2) such as theft convictions which previously have been prosecuted as larceny by trick or embezzlement).

³¹ The first opportunity for the Mississippi Supreme Court to determine the general scope of MRE 609(a)(2) presented itself in *Johnson v. State*, 529 So. 2d 577 (Miss. 1988). *See generally* Peterson v. State, 518 So. 2d 632, 636 n.1 (Miss. 1987) (noting that possession of marijuana does not fall under MRE 609(a)(2)). The *Johnson* court examined whether the crime of the manufacture, possession or transportation of untaxed liquor was one involving dishonesty or false statement so as to impeach the defendant with a prior conviction thereof. *Johnson*, 529 So. 2d at 587. Analogizing the crime to tax evasion, the court found that the defendant defrauded the revenue and, thus, the prior conviction was sufficiently reprehensible to stand high in the class of crimes bearing on the defendant's propensity to testify truthfully and within the purview of MRE 609(a)(2). *Id.*

³² 605 So. 2d 767 (Miss. 1992). The Circuit Court of Scott County, Mississippi held that the burglary convictions were per se admissible stating that:

I think this is the kind of case if presented, the credibility of this individual will be a prime element in the jury's decision, and to withhold the fact he was convicted of two crimes involving veracity, which in my thinking burglary does, would be to withhold from them rules they need to make such determination. . . .

Townsend, 605 So. 2d at 769. Prior to *Townsend*, the supreme court had only considered whether three specific crimes fit within the purview of MRE 609(a)(2). *Id.*

courts,³³ the Mississippi Supreme Court adhered to the Fifth Circuit Court of Appeals' strict construction of the rule³⁴ in deciding that theft crimes are not in the nature of *crimen falsi* and thus, outside of MRE 609(a)(2). In so doing, the *Townsend* court explicitly rejected ample jurisprudence from sister states which are about evenly split on the issue.³⁵ Notwithstanding its decision, however, the court twice alluded to the possibility of nondiscretionary admission of crimes which do not expressly fall within the parameters of the Conference Committee's language.³⁶ The first indication of such a possibility is found in the *Townsend* court's analysis of the *McInnis v. State*³⁷ decision, wherein the court determined that the crime of arson was not of the type contemplated by 609(a)(2).³⁸ The *Townsend* court acknowledged, nevertheless, the *McInnis* court's observation that "in some instances, such as insurance fraud, arson might indeed involve dishonesty or false statement."³⁹ The second instance occurred in the language of the court's holding

at 770; see *Turner v. State*, 573 So. 2d 1335, 1339 (Miss. 1990) (holding that forgery conviction was admissible per 609(a)(2)); *Johnson v. State*, 529 So. 2d 577, 587 (Miss. 1988) (holding that convictions of manufacture, possession or transportation of untaxed liquor were within category of crimes contemplated by MRE 609(a)(2)); *McInnis v. State*, 527 So. 2d 84, 88-89 (Miss. 1988) (holding that arson was not crime involving dishonesty or false statement).

³³ See *supra* note 27.

³⁴ *United States v. Ashley*, 569 F.2d 975, 978-80 (5th Cir.), *cert. denied*, 439 U.S. 853 (1978). Strictly construing the rule, the *Ashley* Court held that shoplifting is not a crime in the nature of *crimen falsi* under FRE 609(a)(2). *Ashley*, 569 F.2d at 979.

³⁵ *Townsend*, 605 So. 2d at 770; see *City of Fairbanks v. Johnson*, 623 P.2d 79, 82 (Alaska 1981); *State v. Page*, 449 So. 2d 813, 815 (Fla. 1984); *Belton v. State*, 475 So. 2d 275, 275 (Fla. Dist. Ct. App. 1985); *People v. Spates*, 395 N.E.2d 563, 568-69 (Ill. 1979); *State v. Calor*, 585 A.2d 1385, 1387 (Me. 1991); *State v. Grover*, 518 A.2d 1039, 1041 (Me. 1986); *State v. Gibeley*, 366 N.W.2d 600, 603 (Minn.), *cert. denied*, 474 U.S. 922 (1985); *State v. Eugene*, 340 N.W.2d 18, 33 (N.D. 1983); *Jaramillo v. Fisher Controls Co.*, 698 P.2d 887, 895 (N.M. Ct. App. 1985); *City of Middleburg Heights v. Theiss*, 501 N.E.2d 1226, 1230 (Ohio Ct. App. 1981); *State v. Lanier*, 778 P.2d 9, 10 (Utah 1989); *State v. Ray*, 806 P.2d 1220, 1227-28 (Wash. 1991).

³⁶ *Townsend*, 605 So. 2d at 770.

³⁷ 527 So. 2d 84 (Miss. 1988).

³⁸ *McInnis*, 527 So. 2d at 88.

³⁹ *Townsend*, 605 So. 2d at 770 (citing *McInnis*, 527 So. 2d at 88 n.1).

which states, "[w]e hold, in accordance with the majority of federal courts, that a burglary conviction is *not ordinarily* admissible under MRE 609(a)(2). . . ."⁴⁰ In light of the noted concession for arson, together with the plain meaning of "not ordinarily," the opinion indicated a reluctance by the court to leave the theft issue completely settled and instead, provided a ray of judicial hope for the automatic admission of some crimes not traditionally recognized on their face as *crimen falsi*.

Subsequent to *Townsend*, the supreme court once again addressed the issue of the admissibility of theft crimes within the parameters of this evidentiary rule in *Bogard v. State*⁴¹ — with Justice Pittman penning the opinion for the majority.⁴² In *Bogard*, the Circuit Court of Lafayette County convicted the defendant of burglary while armed with a deadly weapon.⁴³ The defendant contended, on appeal, that the trial judge erred in permitting the prosecution to impeach his credibility as a

⁴⁰ *Id.* (emphasis added). The "not ordinarily" language is seemingly unnecessary unless the court realized that theft crimes can be committed with an element of deception and, therefore, sought to provide a window for the admission of such crimes in future decisions.

⁴¹ 624 So. 2d 1313 (Miss. 1993).

⁴² *Bogard*, 624 So. 2d at 1315. Justice Pittman strongly dissented from the majority of the *Townsend* court by expressing his opinion of aligning Mississippi with those jurisdictions which hold prior conviction evidence of theft admissible for impeachment purposes. *Townsend*, 605 So. 2d at 771 (Pittman, J., dissenting). Stating that "a man who will steal is likely to lie," Justice Pittman relied on decisional authority from the Supreme Court of Florida for his position. *Id.* at 771-72 (Pittman, J., dissenting). The Supreme Court of Florida delineated its position of prior convictions of theft crimes stating:

There is little doubt but that theft reflects adversely on one's honesty and therefore relates to one's ability to be truthful under oath. . . .

. . . [A]ny misdemeanor, which has as its basis lying, cheating, deceiving, or stealing, bears a reasonable relation to testimonial deceit and should be admissible for impeachment purposes.

State v. Page, 449 So. 2d 813, 815 (Fla. 1984) (quoting *People v. Spates*, 395 N.E.2d 563, 569 (Ill. 1979)). "To restrict the rule's application only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word 'dishonesty.'" *Page*, 449 So. 2d at 815-16. Justice Pittman's *Townsend* dissent appeared, at first blush, to be a forerunner to the court's gradual move away from the strict federal construction of 609(a)(2).

⁴³ *Bogard*, 624 So. 2d at 1315.

witness with evidence of a prior conviction for armed robbery.⁴⁴ This time, the Supreme Court of Mississippi purported, without expressly citing the rule, that the prior burglary conviction was the type of crime 609(a)(2) contemplated, noting that "[i]n common human experience acts of deceit, fraud, cheating, or *stealing* . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity"⁴⁵ and the "stealing of another's money and personal property . . . [has] some *intrinsic* probative value regarding . . . propensity for truthfulness while under oath."⁴⁶ The language clearly indicates a MRE 609(a)(2) analysis on the part of the court, for mere "probative value" more properly refers to "impeachment value,"⁴⁷ but "intrinsic probative value regarding dishonesty" implicates 609(a)(2)⁴⁸ — otherwise, 609(a)(2) would serve no purpose in light of 609(a)(1).⁴⁹ Notwithstanding this notion, however, the court summarily shifted to a discussion of the trial judge's on-the-record determination that the probative value of the prior conviction outweighed any prejudicial effect as mandated by MRE 609(a)(1), holding that the trial judge

⁴⁴ *Id.* Though the defendant's conviction occurred in 1977, the ten year limitation within MRE 609(b) was inapplicable in this case. *Id.* at 1316 n.1.

⁴⁵ *Id.* at 1317 (quoting *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968)) (emphasis in original).

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Tillman v. State*, 606 So. 2d 1103, 1108 (Miss. 1992) (Banks, J., concurring in part, dissenting in part). Justice Banks subscribed to the position that all felonies committed within the prescribed time period of MRE 609(b) have "probative value" which necessarily invokes a weighing of the *Peterson* factors. *Tillman*, 606 So. 2d at 1108 (Banks, J., concurring in part, dissenting in part). The rationale is predicated on the fact that while the common law rule that a convicted felon is incompetent to testify is an antiquated notion, the modern rules of evidence retain the use of felonies for impeachment purposes. *Id.* (Banks, J., concurring in part, dissenting in part).

⁴⁸ *Bogard*, 624 So. 2d at 1322 (Sullivan, J. dissenting). Justice Sullivan recognized that "intrinsic probative value regarding dishonesty" implicated 609(a)(2) by opining that only those crimes in the nature of *crimen falsi* have "intrinsic probative value regarding the offender's propensity for truthfulness while under oath." *Id.* (Sullivan, J., dissenting).

⁴⁹ *See Tillman*, 605 So. 2d at 1108 (Banks, J. dissenting). Justice Banks rhetorically questioned the purpose of MRE 609(a)(2) if the only criteria for evaluating the probative value of 609(a)(1) convictions is whether they involve dishonesty or false statement. *Id.* (Banks, J., dissenting).

acted properly and judiciously.⁵⁰

Thus, the *Bogard* Court enunciated one of two propositions. Either the Mississippi Supreme Court recognized that crimes of theft are so indicative of veracity that such crimes can fall within the purview of MRE 609(a)(2), and the court merely discussed the on-the-record balancing by the trial court because the defendant raised that issue on appeal; or the majority took this occasion to move closer to an automatic admission of theft crimes without totally subscribing thereto and thus, kept in line with prior decisions which require an evaluation of felony theft convictions under MRE 609(a)(1). The most recent Mississippi Supreme Court decision invoking a discussion of MRE 609(a)(2), *Hopkins v. State*,⁵¹ reveals that the latter proposition is more likely the case and more significantly, indicates an unwillingness by the current court to adopt the former proposition.

Hopkins involved judicial review of the trial court's decision to admit evidence of a prior conviction of touching a child for lustful purposes in order to impeach the credibility of the defendant.⁵² Realizing the potential impact of *Bogard*, Justice Sullivan, who strongly dissented from the *Bogard* majority,⁵³ took the occasion in *Hopkins* to bring the Court back on track with its prior position by stating that "[f]elony theft is not a crime 'involving dishonesty or false statement.'"⁵⁴ However, *Hopkins* neither overruled *Bogard* nor did it involve a question of the admissibility of felony theft convictions. Indeed, this language is closer to dicta than any sort of holding.

⁵⁰ *Bogard*, 624 So. 2d at 1317.

⁵¹ 639 So. 2d 1247 (Miss. 1993).

⁵² *Hopkins*, 639 So. 2d at 1247-50.

⁵³ See *Bogard*, 624 So. 2d at 1322 (Sullivan, J., dissenting); see *supra* note 49 and accompanying text.

⁵⁴ *Hopkins*, 639 So. 2d at 1250 (quoting *Coursey v. Broadhurst*, 888 F.2d 338, 342 (5th Cir. 1989)); see *supra* note 48.

IV. PROPOSAL FOR REFORM IN MISSISSIPPI

A. *Problems With Mississippi's Present Approach*

Mississippi's current approach to the admissibility of prior theft convictions pursuant to MRE 609(a), while usually true to the majority of federal courts, is underinclusive and strict. Under current Mississippi evidence law, seemingly no theft crimes are automatically admissible as crimes of "dishonesty or false statement."⁵⁵ Accordingly, Mississippi's strict interpretation of crimes of "dishonesty or false statement" arguably ignores the inferential link between prior theft convictions and future behavior. Additionally, Mississippi's application of MRE 609(a)(2) does little to alleviate the concern of placing the witness in the dilemma of electing between testifying and facing the alleged prejudice associated with prior conviction evidence.

1. *Mississippi's Interpretation Ignores the Inferential Link Between Prior Theft Convictions and Future Behavior*

The definition of crimes involving dishonesty or false statement is of crucial importance since the impetus of MRE 609(a)(2), that the probative value of crimes involving dishonesty or false statement exceeds any prejudicial effect to the witness, is limited in effect if "dishonesty" is too narrowly construed. Essentially, the categorical exclusion of theft crimes refutes the notion that prior theft convictions are inherently predictive of the future possibility of lying. However, "[o]nly the legal intellegensia" agree that such a link does not exist.⁵⁶ The predictive paradigm is nonexistent in one situation: where a crime of violence is at issue.

Critics of the admissibility of theft crimes under 609(a)(2) persistently focus on the distinction between theft crimes and crimes involving "false statement" vis-a-vis "dishonesty."⁵⁷ Such a distinction admittedly exists. The analysis does not end

⁵⁵ See *supra* note 54 and accompanying text.

⁵⁶ *Townsend v. State*, 605 So. 2d 767, 772 (Miss. 1992) (Pittman, J., dissenting).

⁵⁷ MCCORMICK ON EVIDENCE § 42, at 56 (John W. Strong ed., 4th ed. 1992).

here, however, for legislative history reveals that a crime is equally admissible where it personifies the broader category of "dishonesty."⁵⁸ Justification for this interpretation is found in the use of the disjunctive conjunction "or." Truly, "false statement" is an overt action in and of itself, but "dishonesty" more readily refers to a physical manifestation of a false statement, *ergo*, the distinction between perjury and embezzlement.⁵⁹ Where shoplifting, for example, is viewed as a mere physical action,⁶⁰ the inherent element of deception by secretly defrauding the store owner of his goods is not taken into account.

The physical action becomes the overriding feature of the theft crime where it is a crime of violence.⁶¹ When violence

⁵⁸ H.R. REP. NO. 907, 91st Cong., 2d Sess. 62 (1970). The following exchange exhibits the House of Representatives disagreement on the terms "dishonesty or false statements":

Congressman Danielson.

I would like to point out that unless there has been a remarkable change in the meaning of the words in recent years "dishonesty" or "false statement" are not necessarily the same.

I respectfully submit there is no point in using both terms in section 609(a) unless they mean two different things, or at least that the term "dishonesty" is much broader than "false statement."

...
... I want today to make it clear that when I voted for this bill out of committee, and when I vote for it today, it was and is my intention that the term "dishonesty" is broader than "false statement," and any offense involving moral turpitude such as stealing, robbery, burglary, or what have you, in my opinion is an offense involving dishonesty.
Congressman Dennis.

Mr. Chairman, I would agree with my friend that dishonesty is a bit broader than false statement, but I would not agree that it covers crimes of violence.

Id.

⁵⁹ See *People v. Spates*, 395 N.E.2d 563, 568 (Ill. 1979). Applying the natural meaning of the word "dishonesty," the Illinois Supreme Court determined that there was no reason why Rule 609(a)(2) should not encompass "both theft, as an act of dishonesty, as well as perjury, as an act of false statement," especially in light of the "or," designating that either of two alternatives would fall within the rule. *Spates*, 395 N.E.2d at 568.

⁶⁰ See *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977); see also Nowbar, *supra* note 10, at 174.

⁶¹ See *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). The *Gordon* court applied a "rule of thumb" which

underlies the crime, such as in the case of many armed robberies, there is no deceit, dishonesty or untruthfulness which is especially predictive of a witness' propensity to lie,⁶² and thus, such crimes should be excluded from MRE 609(a)(2) along with murder, rape, and the like — bad as they may be. The natural meaning of "dishonesty" and legislative intent come together for a brief moment in mutual agreement on this point. As violence disappears from the thievery and deception and dishonesty take over, the past conduct of the thief and his future credibility become inextricably related.

Commentators can offer statistics⁶³ and social science studies⁶⁴ which purport to show that the fact that a witness has committed a theft crime in the past does not mean that he will lie when testifying.⁶⁵ However, "[t]he life of the law has not been logic; it has been experience."⁶⁶ The argument that

separated those convictions of dishonest conduct which bear on credibility from those of "violent or assaultive crimes" which generally do not. *Gordon*, 383 F.2d at 940.

⁶² 120 CONG. REC. S327081 (daily ed. Nov. 22, 1974). Senator McClellan succinctly stated:

There is no deceit in armed robbery. You take a gun, walk out, and put it in a man's face and say, "Give me your money," or walk up to the counter of the cashier and say, "this is a holdup; give me your money." There is no deceit in that. They are not lying. They mean business. They will murder you if you do not do it.

Id. (statement of Sen. McClellan); see *supra* note 57 (statement of Congressman Dennis). But see *supra* note 60.

⁶³ See Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!/?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 692-97 (1991); Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1044-59 (1984).

⁶⁴ Robert G. Lawson, *Credibility and Character: A Different Look at an Intermittent Problem*, 50 NOTRE DAME L. REV. 758, 767-68 (1974); Ichheiser, *Misunderstandings in Human Relations: A Study in False Social Perception*, 55 AM. J. SOC. 1, 27-28 (1949).

⁶⁵ See Anthony N. Doob & Hershi M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 88-89 (1972) (stating that person who has stolen in one situation is not necessarily likely to lie in second situation).

⁶⁶ Oliver Wendell Holmes, Jr. (unknown source); see David A. Sonenshein, *Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cas-*

the nondiscretionary admission of theft crimes is too prejudicial to the witness⁶⁷ stems from the fact that jurors regard acts of stealing as conduct which adversely reflects on honesty and integrity.⁶⁸ Such a belief is not based on logical deductions but rather upon the widely-believed root of theft, *i.e.*, dishonesty and deception.⁶⁹ Mississippi has often recognized a link between past conduct and future behavior — even where the past conduct is dissimilar from the possibility of negative future behavior.⁷⁰ The link is not premised upon the antiquated “bad person” standard which Wigmore condemned.⁷¹ The link is established by the untrustworthy characteristics the thief possesses and previously exhibited through his crime. In sum, a history of lying can be demonstrated by a prior physical action as well as a prior oral statement.

es Under the Federal Rules of Evidence, 57 GEO. WASH. L. REV. 279, 293 (1988); Note, *To Take the Stand or Not To Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 215 (1968).

⁶⁷ See Marlene B. Hanson, Note, *Balancing Prejudice in Admitting Prior Felony Convictions in Civil Actions: Resolving the 609(a)(1)-403 Conflict*, 63 NOTRE DAME L. REV. 333, 336 (1988).

⁶⁸ *State v. Grover*, 518 A.2d 1039, 1041 (Me. 1986).

⁶⁹ Support for this proposition is found in the common meaning of the term dishonesty: a “breach of honesty or trust, as lying, deceiving, cheating, *stealing*, or defrauding. . . .” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 650 (1971) (emphasis added).

⁷⁰ See, *e.g.*, MISS. CODE ANN. § 73-31-21 (1989) (providing “[t]he board . . . shall withhold, deny, revoke, or suspend any license issued . . . or otherwise discipline a licensed psychologist, upon proof that the . . . licensed psychologist [h]as been convicted of a felony or any offense involving moral turpitude, the record of conviction being conclusive evidence thereof. . . .”) (emphasis added).

⁷¹ 1 JOHN H. WIGMORE, WIGMORE ON EVIDENCE §§ 57, 194 (3d ed. 1940). Wigmore argued that the jury would infer that the defendant should be convicted because the prior convictions demonstrate that the defendant is a “bad person” who the state should incarcerate irrespective of the guilt for the crime presently charged. *Id.*; see Sonenshein, *supra* note 66, at 280-82 (suggesting that jurors likely cannot ignore “impermissible purpose” of conviction).

2. *Mississippi's Application of MRE 609(a)(2) Fails To Alleviate the Concern of Placing the Witness in the Dilemma of Electing Between Testifying and Facing the Prejudice Associated With Evidence of a Prior Conviction*

Proponents of a strict interpretation of crimes of dishonesty or false statement agree that courts should not force witnesses, specifically criminal defendants, to choose between foregoing the constitutional right to testify (thereby allowing the jury to infer guilt from their silence) and facing impeachment with prior conviction evidence (thereby allowing the jury to infer that the defendant acted commensurately with his past actions).⁷² To accept this concern as grounds for excluding theft crimes from the scope of 609(a)(2), however, is to concede that Rule 609(a)(2) is not operating within its rationale and purpose. For the very same dilemma exists where the witness has a prior conviction for "perjury, false statement, fraud, embezzlement, false pretense, or any other offense in the nature of *crimen falsi*. . . ." ⁷³

Clearly, then, as the dilemma currently persists, it is no argument for excluding theft crimes from MRE 609(a)(2) merely because exclusion limits the field of possible situations in which the dilemma might arise.⁷⁴ The fact that this scenario presents a witness with such a choice is the driving force behind safeguards such as cautionary instructions issued to the jury setting out the proper use of impeachment evidence which limits the problem of undue prejudice.⁷⁵

⁷² See JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 609[02], at 609-29 (1990); see also FED. R. EVID. 404 (protecting against use of very similar inferences).

⁷³ FED. R. EVID. 609(a)(2) cmt.

⁷⁴ The legislative history of FRE 609(a)(2) notably lacks evidence of statistical information on the number of perjury, false statement, embezzlement, and false pretense convictions as opposed to the number of convictions for crimes of theft.

⁷⁵ See, e.g., *United States v. Diaz*, 585 F.2d 116, 118 (5th Cir. 1978), cited in *Pugh v. State*, 584 So. 2d 781, 785 (Miss. 1991). In *Diaz*, the Fifth Circuit Court of Appeals imposed a duty upon both the court and counsel to minimize the risk that the jury will infer a defendant's guilt from prior conviction evidence by instructing the jury *sua sponte* on the limited purpose of such evidence. *Diaz*, 585 F.2d at 118; see also *Bogard v. State*, 624 So. 2d 1313, 1317 (Miss. 1993) (dis-

B. Proposal For Reform — A Viable Alternative

Mississippi currently has available to it a viable alternative to the majority federal rule on the nondiscretionary admission of prior theft convictions. Under this approach Mississippi courts would take the position that a crime not formerly recognized to have either deceit or dishonesty as one of its elements may still fall within the parameters of MRE 609(a)(2) if the witness committed the crime in a deceitful manner.⁷⁶ In such a case, the impeaching party must first demonstrate to the court the underlying facts which warrant 609(a)(2) treatment.⁷⁷ This approach serves a two-fold purpose. First, it allows the Mississippi courts to adhere to the strict federal construction of 609(a)(2) by automatically admitting those crimes which are enumerated in the Conference Committee's Report. Secondly, this approach would allow the nondiscretionary admission of theft crimes which are committed deceitfully in exclusion to theft crimes which are crimes of violence. This

curring requisite nature of cautionary or limiting instruction to jury when impeaching defendant); *State v. Brown*, 761 P.2d 588, 593 (Wash. 1988) (enunciating that where trial court admits evidence of prior convictions under Rule 609(a), "an instruction should be given that the conviction is admissible only on the issue of the witness' credibility, and where the defendant is the witness impeached, may not be considered on the issue of guilt"). Studies exist, however, which indicate that juries traditionally use evidence of prior convictions to draw prejudicial inferences in spite of the issuing of a cautionary instruction. *See, e.g.*, Doob & Kirshenbaum, *supra* note 65, at 89 (stating that psychological literature is unsupporting of assumption that cautionary instructions are effective). Interestingly, pre-Mississippi Rules of Evidence law provided for no affirmative duty to give the jury a limited instruction. *Simmons v. State*, 358 So. 2d 1324, 1326 (Miss. 1978); *Murphy v. State*, 336 So. 2d 213, 216-17 (Miss. 1976).

⁷⁶ *See United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982). Seven of the thirteen Federal Judicial Circuits currently recognize that the trial court may inquire into the facts which underlie a conviction to determine if it is one contemplated by 609(a)(2). *United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984); *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982); *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982); *United States v. Seamster*, 568 F.2d 188, 190-91 (10th Cir. 1978); *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977); *United States v. Smith*, 551 F.2d 348, 364 n.28 (D.C. Cir. 1976); *Virgin Islands v. Toto*, 529 F.2d 278, 282 (3d Cir. 1976).

⁷⁷ *See supra* note 75.

mechanism would serve the true intent of the legislature as well as recognize the common understanding of the term "dishonesty."

V. CONCLUSION

Members of the Mississippi Supreme Court have shown a fleeting desire to stray from the majority federal view of crimes involving dishonesty⁷⁸ — all members are not on the same page however.⁷⁹ A definition of "dishonesty" that would embody those theft crimes with a predicate of dishonesty, to the exclusion of violent theft crimes, should serve the true intent of 609(a)(2) while providing the witness, particularly the criminal defendant, with no less protection than the inclusion of those crimes which were enumerated by the United States Congress.⁸⁰ Moreover, the cautionary or limiting instruction is an ever-present gatekeeper for impeaching evidence.⁸¹

Despite hours of debate, from which many words were documented,⁸² the lack of judicial consensus seemingly springs from the use of a single term — *crimen falsi*. It is readily apparent that the intent of the Congress was to allow the automatic admission of those crimes which are so indicative of a witness' propensity to lie, not to create a *crimen falsi* quagmire wherein courts and commentators were to lose themselves translating and interpreting the term. Service of this intent is accomplished by measuring the crime with a judicial analysis tempered by the manner in which the witness committed it. Should the courts of Mississippi continue to be bound by a belief that the *raison d'être* of 609(a)(2) is not crimes of theft, then the lesson of *Pugh v. State* is bound to be repeated.⁸³

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⁷⁸ See *supra* notes 45-59 and accompanying text.

⁷⁹ See *supra* note 54 and accompanying text.

⁸⁰ See *supra* note 72 and accompanying text.

⁸¹ See *supra* note 74 and accompanying text.

⁸² See *supra* notes 28, 57, and 61 and accompanying text.

⁸³ See notes 2-7 and accompanying text.

**HEFLIN V. STATE—ADMISSION OF THE HEARSAY
STATEMENTS OF CHILD SEXUAL ABUSE VICTIMS THROUGH
MANIPULATION OF THE EXCITED UTTERANCE EXCEPTION:
THE RIGHT RESULT, BUT THE WRONG MEANS**

I. INTRODUCTION

Undeniably, child sexual abuse is one of society's most brutal and life-shattering crimes.¹ Often, the young victim is the only witness to the incident, and thus, the victim's statement is the only evidence of the crime.² The hearsay rule prevents the use of such statements in most instances.³ Additionally, the mental capabilities of young children detrimentally affect the reliability and completeness of their testimony at trial.⁴ Consequently, such prosecutions are challenging, and convictions are difficult to achieve.⁵ The purpose of this com-

¹ See 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 4.1 (2d ed. 1992). Reports estimate that as many as 10-15% of males and 20-25% of females are sexually abused. *Id.* § 4.2. The recent increase in the number of reported incidents is the result of the adoption of reporting laws and societal awareness of the problem. *Id.* § 4.2 n.5.

² See Cynthia J. Hennings, Comment, *Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions*, 16 OHIO N.U. L. REV. 663, 663-65 (1989). The need for a special hearsay exception arises due to the concern for child sexual abuse victims. *Id.* at 664. Typically the child's statement is the only evidence of the crime; thus, necessity demands the admission of these statements. *Id.* The nature of child victims and their inexperience in sexual matters imply sufficient reliability. *Id.* Additionally, there is a need to protect child victims from courtroom trauma. *Id.*; see also *Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988) (stating that hearsay statements of child abuse victims present "deeply troubling problem" to courts and legislatures); *In re E.P.*, 521 N.E.2d 603, 607 (Ill. App. Ct. 1988) (holding that hearsay statements of child abuse victims are significant).

³ See MISS. R. EVID. 802.

⁴ See MYERS, *supra* note 1, § 4.1. The main problem with prosecuting child sexual abuse cases is the lack of evidence. *Id.* The crime almost exclusively takes place in secret; thus, other than the perpetrator, the child is the only witness. *Id.*

⁵ See *Morgan*, 846 F.2d at 943 (acknowledging extreme difficulty of prosecuting sexual abuse cases and noting few convictions achieved).

ment is to analyze the Mississippi Supreme Court's treatment of the issue, particularly its recent decision in *Heflin v. State*.⁶ Although the court should be commended for its efforts to shape the current rules of evidence in order to admit the hearsay statements of child victims, these efforts have greatly distorted the excited utterance exception. In light of the importance of implementing a method to effectively address the problems surrounding child sexual abuse cases, the court should continue its efforts to admit the victims' statements. However, it should refrain from stretching the excited utterance exception beyond its established foundations. The danger created by the *Heflin* decision may be avoided without sacrificing the court's goal of admitting the child victim's statement. Although this comment is directed at the problems surrounding child victims, the treatment of statements by adult victims will also be discussed in order to present a complete picture of the court's rationale.

II. *HEFLIN V. STATE* AND THE APPROACHES OF THE MISSISSIPPI SUPREME COURT TO THE HEARSAY STATEMENTS OF VICTIMS OF SEXUAL ASSAULT AND ABUSE

Since the adoption of the rules of evidence,⁷ the Mississippi Supreme Court has manipulated the excited utterance exception in an effort to help prosecute child sexual abuse cases. The case of *Heflin v. State*⁸ is the latest pronouncement of this policy.

The *Heflin* decision focused on statements that a sixteen-year-old victim made to her sister approximately twenty-four hours after she allegedly was assaulted sexually by her father.⁹ In upholding the admission of the victim's statement,

⁶ 643 So. 2d 512 (Miss. 1994).

⁷ The Mississippi Supreme Court adopted the rules of evidence on September 24, 1985. Order Adopting the Mississippi Rules of Evidence, *reprinted in* MISS. R. CT. 121-22 (West 1995). The order adopting the rules provided that as of January 1, 1986, all actions would be governed by the newly adopted rules. *Id.* This, in effect, superseded all the court-made principles of evidence. *See infra* note 36 and accompanying text.

⁸ 643 So. 2d 512 (Miss. 1994).

⁹ *Heflin*, 643 So. 2d at 518-19. The sixteen-year-old victim alleged that she

the court combined pre-rule reasoning with the excited utterance exception. The court first analyzed the admissibility of the victim's statement under the criteria¹⁰ for the excited utterance exception—a spontaneous statement made while under the stress of the incident.¹¹ The time lapse, while not wholly dispositive of the issue, weighed heavily in the court's assessment of the spontaneity of the statement. To explain the substantial time lapse,¹² the court turned to the serious and long-lasting effects of sexual abuse on young victims.¹³ In addition, the court reasoned that since the victim made the statement at the first opportunity,¹⁴ the delay was adequate-

had been raped three times by her father. *Id.* at 514. The victim and her father spent the day at a sandbar. *Id.* Due to car troubles, they were unable to leave the sandbar. *Id.* The victim claimed that during this period her father raped her. *Id.* The defendant-father testified that as soon as the car was fixed, the two went home. *Heflin*, 643 So. 2d at 519. On the way home, they stopped off at a convenience store where they encountered some friends. *Id.* at 519. Thereafter, the two returned home and had dinner with the defendant's wife and another acquaintance. *Id.* Evidence at trial revealed the possibility that the victim telephoned her boyfriend some time after she returned home. *Id.* The next morning the victim telephoned her sister but did not relay the events of the previous day. *Id.* The statements at issue were made to the victim's sister almost 24 hours after the incident when the sister picked the victim up from her place of employment. *Heflin*, 643 So. 2d at 519. The trial judge allowed the sister to testify about the victim's statements. *Id.* at 518. The sister noted that the victim was visibly upset when she first saw her. *Id.* The sister observed bruises around the victim's neck and testified that she was crying. *Id.* As the two drove off, the victim broke down and told her sister what had happened. *Id.* at 518-19. The victim told her sister, "[m]y dad raped me." *Heflin*, 643 So. 2d at 519. The trial judge found the sister's testimony concerning the statement admissible under the excited utterance exception. *Id.*; see MISS. R. EVID. 803(2) (providing that excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

¹⁰ *Heflin*, 643 So. 2d at 519. The court stated that a determination of whether or not a statement qualified as an excited utterance was a matter of discretion for the trial judge. *Id.* at 519-20 (citing *Davis v. State*, 611 So. 2d 906, 914 (Miss. 1992)).

¹¹ *Id.* at 519 (citing *Evans v. State*, 547 So. 2d 38, 41 (Miss. 1989)).

¹² *Id.* The defendant argued that the substantial lapse in time prevented the victim's statement from being labeled "spontaneous." *Id.*

¹³ *Id.* The court noted the great "personal shame, embarrassment, and stress" that afflicts rape victims. *Id.* The court particularly acknowledged the intensity of such effects on minors victimized by a parent. *Id.*

¹⁴ *Id.* Because the victim was surrounded by individuals closely associated with the defendant, the court determined that the victim's meeting with her sis-

ly explained.¹⁵ Despite the lapse of time and the victim's interaction with several other individuals, the court believed the victim was still under the stress of the event.¹⁶ It should be noted that the court also found the statement admissible under Mississippi Rule of Evidence 801(d)(1)(B).¹⁷

A. *The Court's Pre-Rule Approach*

Prior to the adoption of the Mississippi Rules of Evidence, the Mississippi Supreme Court had developed a policy of admitting hearsay statements of sexual abuse and assault victims. At first, the court made no clear distinction between an

ter the next day represented the first opportunity for the victim to cry out. *Id.* Interestingly, the court focused on the relationship of the victim and her sister. *Id.* The reasoning behind this may be the court's view of the nature of the crime and the stigma attached thereto. *Id.*; see *infra* notes 31-40 and accompanying text.

¹⁵ *Heflin*, 643 So. 2d at 519. The court determined that the particular circumstances surrounding the delay sufficiently explained the delay. *Id.*

¹⁶ *Id.* The court noted that the excited utterance exception did not contain any express time limit. *Id.* In addition, the court held that it was not unreasonable for a sixteen-year-old, raped by her father, to still be upset the next day. *Id.* At this point the court failed to clarify whether or not an excited state can last indefinitely. Undoubtedly, the child victim, as any other victim, would still be upset days, months, and even years later. The question is left open as to whether or not statements under these circumstances could qualify as excited utterances. Various jurisdictions have addressed the issue of rekindled excitement and its ramifications on the applicability of the excited utterance exception to the statements of child victims. Compare *State v. Shaw*, 542 A.2d 1106, 1109 (Vt. 1987) (inferring that rekindled excitement would support admission under excited utterance exception) and *State v. Lindner*, 419 N.W.2d 352, 356-57 (Wis. Ct. App. 1987) (upholding admission of statement made after excited state rekindled by child viewing film on good and bad touching) with *State v. Jano*, 524 So. 2d 660, 664 (Fla. 1988) (holding that rekindled excitement occurring after calm period did not support admission of declarant's hearsay statement under excited utterance exception). The cases approving rekindled excitement as a basis for applying the excited utterance exception directly contradict the foundations of the exception. See *infra* notes 46-48 and accompanying text.

¹⁷ *Heflin*, 643 So. 2d at 520; see MISS. R. EVID. 801(d)(1)(B) (stating that prior statement is not hearsay where declarant has testified at trial or hearing and is subject to cross-examination concerning statement consistent with testimony and where statement is offered to rebut charge of recent fabrication). There is no indication why the court chose to extend the excited utterance exception instead of relying solely upon the more clearly applicable and straightforward approach of 801(d)(1)(B) of the Mississippi Rules of Evidence. This may indicate that the court is interested in achieving a certain result—the admission of a sexual abuse victim's statement—regardless of the means used to achieve that result.

adult victim and a child victim. While it appears that later decisions created different exceptions for child and adult victims, the court intertwined the reasoning for each in a manner which supports the theory that the court, in general, applied one exception.

The court first addressed¹⁸ the issue in the 1903 case of *Anderson v. State*.¹⁹ The court held an exception, which became known as the *Anderson* rule, existed for a rape victim's hearsay statement, but only to the extent that she proclaimed she had been ravished.²⁰ The court opined that the ravished woman would speak up to protect her virtue.²¹

The court's first decision dealing with a child victim occurred in 1956.²² Citing Wigmore and offering no additional reasoning, the court modified the *Anderson* rule to include

¹⁸ In all subsequent cases, the court referred to the exception governing the admissibility of a sexual assault victim's hearsay statements as the *Anderson* rule. In actuality, the rule was first announced in the earlier case of *Ashford v. State*, 33 So. 174, 174 (Miss. 1903). The *Ashford* court held that, in a rape case, it could be shown that the victim had claimed that she had been ravished. *Ashford*, 33 So. at 174. The *Ashford* court reasoned that because "[t]he outrage in such a case upon a virtuous female is so great that there is a natural presumption that [at] the first suitable opportunity she will make disclosure of it, and she would be so far discredited if she did not make the disclosure." *Id.* Thus, the court concluded that any silence on the part of the victim suggested consent. *Id.* While this reasoning was clearly reflective of the time period, it nevertheless established the court's concern for these victims.

¹⁹ 35 So. 202 (Miss. 1903). The *Anderson* case involved a rape conviction. *Anderson*, 35 So. at 202. The witness, the victim's daughter, testified that the victim reported the incident to her immediately after the rape. *Id.* at 203. The witness also testified, over repeated objections by the defendant, as to the name of the person the victim identified as her attacker. *Id.*

²⁰ *Anderson*, 35 So. at 203. The court concluded that the details, time, place, description, or identification of the attacker were still inadmissible hearsay. *Id.* The court explicitly stated that the exception applied only to rape cases. *Id.* In fact, the court declared that normally any statements by the victim of an attack were inadmissible hearsay. *Id.* In addition, the court noted that under *res gestae*, a witness could testify as to any physical manifestations of an attack on the victim or the victim's clothes. *Id.* Erroneously, the lower court relied on this exception to allow the witness to testify as to the victim's statement of identification. *Anderson*, 35 So. at 202-03.

²¹ *Id.* at 203 (citing *Ashford v. State*, 33 So. 174 (Miss. 1903)).

²² See *Lauderdale v. State*, 85 So. 2d 822 (Miss. 1956). The victim in *Lauderdale* was eleven-years-old at the time of the incident. *Lauderdale*, 85 So. 2d at 822. The incident occurred about midnight, and the victim reported the attack to her teacher the following morning. *Id.*

portions of the victim's statement which detailed the time and place of the attack.²³ Noticeably absent from the decision was any reference to what effect the victim's age or the lapse of time had on admissibility under the *Anderson* rule.

A child victim case brought the hearsay issue to the court again in 1983.²⁴ The court adopted the "tender years" exception, concentrating on spontaneity and the absence of any indication of manufactured testimony on the part of the declarant.²⁵ In addressing the time lapse between the incident and the declaration, the court implied that a delay would not be per se fatal if adequately explained.²⁶

Despite the express statement of a specific exception for child victims,²⁷ in 1985 the court arrived at a single exception for all cases when they merged the "tender years" exception with the *Anderson* rule.²⁸ As a result, the portion of the

²³ *Lauderdale*, 85 So. 2d at 823.

²⁴ *Williams v. State*, 427 So. 2d 100 (Miss. 1983). The *Williams* case involved an eleven-year-old female. *Williams*, 427 So. 2d at 101. The morning after the incident, the victim told her sister about the attack. *Id.* The defendant, however, challenged the trial court's admission of the victim's statements on the grounds that she had not made the statement as soon as reasonably possible. *Id.* at 102. The court's initial handling of the time delay focused on threats by the defendant to kill the victim if she told anyone. *Id.* The defendant also told the victim that her mother would not believe her. *Id.* The court noted the effects of such threats upon a young child's mind and used the statements to excuse the child's delay. *Williams*, 427 So. 2d at 102.

²⁵ *Williams*, 427 So. 2d at 102-03. The court first reiterated the *Anderson* line of cases. *Id.* at 102. In addition to the *Anderson* reasoning, the court adopted the reasoning of the Michigan Court of Appeals, which stated:

[h]earsay testimony concerning the details of a complaint of sexual assault is admissible where the complainant is of "tender years" if her statement is shown to have been spontaneous and without indication of manufacture, and if any delay in making the complaint is excusable insofar as it is caused by fear or other equally effective circumstances.

Id. at 102-03 (quoting *People v. Mikula*, 269 N.W.2d 195, 199 (Mich. Ct. App. 1978)).

²⁶ *Id.* at 103.

²⁷ *Cunningham v. State*, 467 So. 2d 902, 905 (Miss. 1985).

²⁸ *Cunningham*, 467 So. 2d at 905-06. In *Cunningham*, the defendant abducted, raped, and robbed the victim. *Id.* at 903. The victim escaped at the first opportunity and immediately told a truck driver what had happened. *Id.* at 904. The victim later described the defendant and his location to a police officer. *Id.* The officer testified at trial as to the description given by the victim. *Id.* The court's modification of the *Anderson* rule basically mirrored the court's decision in

victim's hearsay statement identifying the perpetrator was admissible.²⁹ Spontaneity and the absence of any indication of manufacturing served as the criteria for admissibility under the new *Anderson* rule.³⁰

B. The Court's Post-Rule Approach

The first significant post-rule case forced the Mississippi Supreme Court to address the effect of a substantial time lapse on the admissibility of a victim's statements.³¹ Relying completely on the excited utterance exception, the court upheld the admission of a statement made some six hours after

Williams in all major respects. See *supra* notes 24-26 and accompanying text.

²⁹ *Cunningham*, 467 So. 2d at 906; see also *Oates v. State*, 437 So. 2d 441, 442-43 (Miss. 1983) (holding victim's hearsay statement describing attacker admissible).

³⁰ *Cunningham*, 467 So. 2d at 905-06. There is no discernable difference between the rule announced in *Cunningham* and the *Williams* "tender years" exception. This strongly suggests that the court was interested in admitting statements of all sexual assault and abuse victims. The court's lack of attention to spontaneity in any of its decisions indicates that the spontaneity element is not a consideration when determining admissibility. This is supported by the absence of any discussion of the effects of a substantial passage in time on admissibility. The absence of emphasis on spontaneity may be attributable to two factors. First, the court was not faced with any substantial time disparity which required such a discussion. Second, since the court did not rely on any common law or statutory exception to support its decision, the court may have reasoned that spontaneity was not an element to be considered.

³¹ *Evans v. State*, 547 So. 2d 38, 40-41 (Miss. 1989). In *Evans*, the victim's statement was made several hours after the assault occurred. *Evans*, 547 So. 2d at 40. The court first addressed the subject of time lapse in a child victim scenario in *Gill v. State*, 485 So. 2d 1047, 1050 (Miss. 1986). In *Gill*, the victim's father attempted to sexually batter her. *Gill*, 485 So. 2d at 1048. The victim's mother drove up during the incident, and the victim escaped. *Id.* The victim ran to a neighbor's house, where she related to the neighbor what the defendant had done. *Id.* The neighbor testified that the victim was "hysterical and crying" when she arrived. *Id.* The court reiterated the evolution of the *Anderson-Cunningham* line of cases. *Id.* at 1050. To no avail, the defendant attempted to distinguish the case at bar from *Cunningham*. *Gill*, 485 So. 2d at 1050. The defendant argued that *Cunningham* did not apply because the victim ran past her mother without telling her of the incident. *Id.* The defendant further argued that the victim had sufficient time to manufacture the incident between the time she left his company and the time she arrived at the neighbor's residence. *Id.* The court found both of these contentions inadequate and upheld the admission of the victim's statement. *Id.* However, the court made no reference to how the rules of evidence would affect the exception. *Id.*

the assault.³² The court concluded that the lapse in time was adequately explained, since the victim complained at the first opportunity to the first person she encountered.³³ In evaluating the presence of spontaneity, the court adopted a facts-and-circumstances test to be applied on a case-by-case basis.³⁴

The court again applied the excited utterance exception in 1991, when it upheld the admissibility of statements made by a fourteen-year-old female victim.³⁵ Due to the adoption of the rules of evidence, the court held that the pre-rule cases were inapplicable to the case at bar.³⁶ However, this instruc-

³² *Evans v. State*, 547 So. 2d 38, 41 (Miss. 1989). In *Evans*, the victim, a Catholic nun, was raped by a man whom she had met prior to the attack. *Evans*, 547 So. 2d at 39. After the victim escaped, she drove home in search of her housemate. *Id.* The housemate testified that upon the victim's return home, she recounted the entire incident. *Id.* at 40. The housemate's testimony included the information relayed to her. *Id.* The trial judge admitted the testimony under the excited utterance exception. *Id.* at 40-41.

³³ *Evans*, 547 So. 2d at 41. The decision also noted the victim's physical condition at the time she made the declaration. *Id.*

³⁴ *Id.* The court adopted the excited utterance criteria announced by the Alabama Court of Criminal Appeals. *Id.* (citing *Harris v. State*, 394 So. 2d 96, 98 (Ala. Crim. App. 1981)). Statements that qualify under the exception must be deemed spontaneous by the trial judge. *Id.* Such a determination would not be set aside if the determination represented a "reasonable interpretation of the facts." *Id.*

³⁵ *Sanders v. State*, 586 So. 2d 792, 794 (Miss. 1991). In *Sanders*, the defendant forced the victim into his car and sexually battered her. *Sanders*, 586 So. 2d at 794. After the attack, the victim fled and relayed the event to several nearby crossing guards. *Id.* One of the crossing guards testified as to what the victim told the group of guards. *Id.*

³⁶ *Sanders*, 586 So. 2d at 794-95. The trial court did not provide a basis supporting its decision to uphold the admission of the victim's statement as an excited utterance. *Id.* at 795. The court determined that if the trial court relied upon any pre-rule concept inconsistent with the rules of evidence, then the conviction would have to be overturned. *Id.*; see MISS. R. EVID. 1103; see also *Leatherwood v. State*, 548 So. 2d 389, 400 (Miss. 1989) (holding that trial courts may not rely upon pre-rule decisions when determining admissibility of child victim's hearsay statement); *Mitchell v. State*, 539 So. 2d 1366, 1369 (Miss. 1989) (stating that court must apply rules of evidence instead of pre-rule "tender years" exception when determining admissibility of child victim's statement). The *Sanders* court found that the lower court's decision did not rest on any principles inconsistent with the rules. *Sanders*, 586 So. 2d at 795-96. In particular, the court articulated the idea that *Cunningham* was probably consistent with the rules. *Id.* at 795 n.2. This indicates the possibility that the court will implicitly apply the reasoning behind the *Cunningham* line of cases in situations involving child victims of sexual abuse.

tion did not greatly affect the court's review, as it basically used the familiar pre-rule rationale to find the statement admissible under the recently adopted rules of evidence.³⁷ The court also found that questioning the victim did not adversely affect the spontaneity requirement of the excited utterance exception.³⁸ Since the victim was visibly shaken and upset at the time, the court found that questioning did not destroy the spontaneity of the victim's statement.³⁹ The victim's emotionally distraught state at the time of the declaration excused the delay between the incident and the statement.⁴⁰ The decision thus clearly added the victim's emotional state as a factor to consider when determining admissibility. Noticeably absent from the court's decision, however, was any discussion of the victim's age and any effects which age

³⁷ *Sanders*, 586 So. 2d at 795-96.

³⁸ *Id.* at 795. The court did not give an absolute stamp of approval to situations involving the questioning of victims. *Id.* For instance, questioning by police officers which suggests answers is clearly improper. *Id.* However, in this case, the only question the police asked of the *Sander's* victim was "what happened." *Id.*; see *In re Daniel Z.*, 13 Cal. Rptr. 2d 139, 146 (Cal. Ct. App. 1992) (holding statements elicited by simple and nonsuggestive questioning did not necessarily display lack of spontaneity); *Commonwealth v. Crawford*, 629 N.E.2d 1332, 1335 n.3 (Mass. 1994) (admitting statement made in response to police question "what happened").

³⁹ *Sanders*, 586 So. 2d at 795-96. The victim's disturbed emotional state helped to negate the appellant's contention that the questioning destroyed the spontaneity of the victim's statement. *Id.*; see *United States v. Glenn*, 473 F.2d 191, 194 (D.C. Cir. 1972) (holding that statements may qualify as excited utterance even though made in response to questioning).

⁴⁰ *Sanders*, 586 So. 2d at 795-96. Therefore, the court found that the spontaneity of the victim's declaration was not destroyed because of the time lapse since the victim was still visibly upset. *Id.* Apparently the court believed that the victim's reflective capabilities were still inactive. See *Mitchell v. State*, 539 So. 2d 1366, 1370 (Miss. 1989) (finding excited utterance exception inapplicable to child victim's statement because child was not under stress of incident when she made declaration); see also *State v. Thompson*, 820 P.2d 335, 338 (Ariz. Ct. App. 1991) (stating that child victim's statement must have been made while child was excited in order to qualify as excited utterance). The court's concentration on the victim's emotional state at the time of the declaration comports with the approaches used by other jurisdictions. See *People v. Ortega*, 672 P.2d 215, 218 (Colo. Ct. App. 1983) (stating that child's visibly disturbed mental state weighed heavily in favor of admitting statement as excited utterance); *Lyles v. State*, 412 So. 2d 458, 460 (Fla. Dist. Ct. App. 1982) (holding four-year-old victim's statement made in response to interrogation after normal playing not admissible as excited utterance).

might have on making a determination of admissibility.

In the post-rule era, the court has addressed the admissibility of hearsay statements made by child sexual abuse victims in various contexts. In addition to the excited utterance exception, the court has applied the residual exception,⁴¹ the rebutting charges of recent fabrication exception,⁴² the medical diagnosis exception,⁴³ and the recently adopted tender years exception.⁴⁴ While it appears that the court is deeply

⁴¹ See *Bailey v. Woodstock*, 574 So. 2d 1369, 1373 (Miss. 1990) (holding that hearsay statement of child sexual assault victim may be admissible under residual exception if criteria satisfied); see also *Quimby v. State*, 604 So. 2d 741, 747 (Miss. 1992) (denoting trustworthiness, materiality, probative value, interests of justice, and notice as prerequisites for admission under residual exception).

⁴² See *Hosford v. State*, 560 So. 2d 163, 167-68 (Miss. 1990) (declaring that number of courts have allowed use of child victim's hearsay statements as corroborative evidence subsequent to defendant's impeachment of victim's testimony); see also *Nitz v. State*, 720 P.2d 55, 60-61 (Alaska Ct. App. 1986) (stating that admission of prior consistent statement of victim in child sexual abuse case was critical, given uniqueness of surrounding circumstances).

⁴³ See *Jones v. State*, 606 So. 2d 1051, 1056-57 (Miss. 1992) (holding that medical diagnosis exception may be used when abuser was member of victim's immediate household). The *Jones* decision rejected the prosecution's reliance on the medical diagnosis exception because the abuser, the victim's father, only had joint custody of the victim. *Jones*, 606 So. 2d at 1057; see also *State v. Dollinger*, 568 A.2d 1058, 1060 (Conn. App. Ct. 1990) (holding that statements made to physician attempting to ascertain identity of abuser were admissible to prevent recurrence and to facilitate treatment of abuse by family members).

⁴⁴ See *Hall v. State*, 611 So. 2d 915, 922 (Miss. 1993) (applying "tender years" exception); *Baine v. State*, 606 So. 2d 1076, 1079 (Miss. 1992) (factoring child's young age into excited utterance analysis); *Griffith v. State*, 584 So. 2d 383, 388 (Miss. 1991) (stating "tender years" exception applicable). Many states, Mississippi included, have enacted tender years legislation to help alleviate the problems inherent in prosecuting child sexual abuse cases. See, e.g., ALA. CODE § 15-25-31 (Supp. 1990); ALASKA STAT. § 12.40.110. (1990); COLO. REV. STAT. § 13-25-129 (1987 & Supp. 1994); FLA. STAT. ANN. § 90.802(23) (West Supp. 1995); GA. CODE ANN. § 24-3-16 (Mitchie Supp. 1994); IDAHO CODE § 19-3024 (1987); ILL. ANN. STAT. ch. 725 para. 5/115-10 (Smith-Hurd Supp. 1994); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1994); KAN. STAT. ANN. § 60-460(dd) (1989); ME. REV. STAT. ANN. tit. 14, § 1205 (West Cum. Supp. 1990); MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (Supp. 1994); MASS. GEN. LAWS ANN. ch. 233, §§ 81-83 (West Supp. 1994); MINN. STAT. ANN. § 595.02 (West Supp. 1995); MISS. CODE ANN. § 13-1-403 (Cum. Supp. 1990); MO. ANN. STAT. § 491.075 (Vernon Supp. 1995); NEV. REV. STAT. ANN. § 51.385 (Mitchie 1994); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1995); OR. REV. STAT. § 40.460(18a) (Supp. 1994); 42 PA. CONS. STAT. ANN. § 5985.1 (Supp. 1994); S.D. CODIFIED LAWS ANN. § 19-16-38 (Supp. 1994); TEX. CRIM. PROC. CODE ANN. § 38.072 (West Supp. 1995); UTAH CODE ANN. § 76-5-411

concerned with this issue, no clear indication exists as to the approach it will take. The *Heflin* decision represents the high water mark of this confusion. While the court should be praised for its efforts in this area, what is needed is a clear and straight-forward approach.

III. HOW *HEFLIN* HAS EXTENDED THE EXCITED UTTERANCE EXCEPTION BEYOND REASONABLE PARAMETERS

The excited utterance exception rests upon the theory that the reliability needed to overcome the rule against hearsay⁴⁵ is satisfied when a declarant's reflective powers are temporarily suspended due to the excitement of a startling event.⁴⁶ The critical issue, therefore, for a statement to be admissible under the exception is whether it is a reaction to the exciting event or a product of reflective thought.⁴⁷ As a result, any time lapse between the event and declaration becomes an important factor in determining the applicability of the exception.⁴⁸

In light of the traditional foundations of the excited utter-

(1995); WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1995).

⁴⁵ The rule against hearsay rests upon the principle that extra-judicial statements are not reliable due to the absence of oath, presence, and cross-examination. 4 DAVID W. LOUISELL & CHRISTOPHER B. MEULLER, *FEDERAL EVIDENCE* § 413, at 69 (1980). The rule against hearsay is necessary in order to avoid the dangers of ambiguity, insincerity, failure of memory, and misperception. *Id.* at 69-70.

⁴⁶ MCCORMICK ON EVIDENCE § 272 (John W. Strong ed., 4th ed. 1992). The formulations of the excited utterance exception vary from jurisdiction to jurisdiction. *Id.* However, two basic requirements are seen in every form of the exception. *Id.* First, the event in question must be "sufficiently startling" so as to suspend the reflective capabilities of the declarant whose statement is at issue. *Id.* Second, the statement must be a spontaneous reaction to the exciting event just witnessed and not the product of reflective thought. *Id.* But see I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 28-29 (declaring excited utterance exception to be most unreliable type of evidence because excited condition does not guarantee that declarant cannot lie). Excitement can often cause a person to exaggerate the facts surrounding an event. *Id.* The excitement can also distort the perception and memory of the declarant. *Id.*

⁴⁷ See MCCORMICK, *supra* note 46, § 272.

⁴⁸ See CAROLYN E. STATON, *MISSISSIPPI EVIDENCE* 277-78 (3d ed. 1995) (stating that time lapse between startling event and declaration is just one element to be considered by trial court deciding admissibility under excited utterance exception).

ance exception, one can see that the decision in *Heflin* fails to consider the repercussions of using the exception to admit a statement made almost twenty-four hours after the incident.⁴⁹ People remain excited for different lengths of time; however, at some point reflection by the individual is inevitable.⁵⁰ The exception assumes the total suspension of reflection and denies the possibility that, as time passes, the individual will replay the incident over and over in his or her mind.⁵¹ The *Heflin* decision thus implies that an excited condition can last indefinitely.⁵² From the court's opinion, it appears that the applicability of the exception is not adversely affected when a victim calms down and then, subsequently, becomes excited again.⁵³ During a calm period, reflective thought will diminish the trustworthiness and reliability of the subsequent statement. One can easily imagine some event in a victim's life which will inflame old memories, even years later, when the event is remembered. While such a scenario may be stretching the decision slightly, it is not entirely inconceivable given the court's broad reasoning.⁵⁴ If this is an accurate interpretation, the foundations of reliability and trust-

⁴⁹ *Heflin v. State*, 643 So. 2d 512, 519 (Miss. 1994). A statement made by the victim to her sister almost twenty-four hours after an alleged rape was held admissible. *Heflin*, 643 So. 2d at 519.

⁵⁰ See Stewart, *supra* note 46, at 28-34.

⁵¹ See 6 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1747 (Chadbourn Rev. 1976).

⁵² *Heflin*, 643 So. 2d at 519. Admittedly, the rule does not contain any express time limit. See MISS R. EVID. 803(2); see also STATON, *supra* note 48, at 277 (stating that central inquiry of excited utterance exception is spontaneity, not strict adherence to passage of time). See generally Stanley A. Goldman, *Distorted Vision: Spontaneous Exclamations as a "Firmly Rooted" Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453, 460 (1990) (discussing connection between time and excited utterance). But see *supra* note 16.

⁵³ See *Heflin*, 643 So. 2d at 519. In *Heflin*, the victim became excited when she made a statement to her sister regarding an alleged rape, hours after the crime allegedly occurred. *Id.* at 518-19.

⁵⁴ *Id.* at 519-20. The court's feelings towards the nature of the crime may explain why the *Heflin* decision is so broad. *Id.* The court specifically acknowledged the horrible effects of rape by noting the "very unique personal shame, embarrassment, and stress" associated with the crime. *Id.* at 519. The court's special attention to sexual assault and abuse is not unique. See *infra* notes 57-58 and accompanying text.

worthiness have been discarded with this new application.⁵⁵

The *Heflin* court appeared to rely upon the age of the victim as the main factor supporting its broad, liberal interpretation of the excited utterance exception.⁵⁶ Numerous jurisdictions have relied upon the young age of a sexual abuse victim to support a more flexible and forgiving application of the excited utterance exception.⁵⁷ While the Mississippi Supreme Court's decision is patently consistent with this approach, a closer look uncovers a slightly different analysis. The victim in *Heflin* was sixteen years old at the time of the sexual assault. Other courts typically have admitted statements of much younger victims.⁵⁸ The inherent characteris-

⁵⁵ WIGMORE, *supra* note 51, §§ 1420-22. The admission of hearsay evidence under an exception rests upon the two precepts of need and trustworthiness. *Id.* The need for the hearsay statements of sexual assault and abuse victims is not questionable. *See Morgan v. Foretich*, 846 F.2d 941, 943-46 (4th Cir. 1988) (stating reasons why hearsay evidence in child sexual abuse cases is invaluable). However, the trustworthiness of the statement becomes a problem since, as the time lapse between the incident and the declaration increases, so do the chances for fabrication and coaching. *Cf. Idaho v. Wright*, 497 U.S. 805, 820 (1990) (holding that excited state of declarant "eliminates the possibility of fabrication, coaching, or confabulation").

⁵⁶ *See supra* note 9 and accompanying text.

⁵⁷ *See State v. Padilla*, 329 N.W.2d 263, 266 (Wis. Ct. App. 1982). The inherent characteristics of children support a different interpretation of the excited utterance exception. *Padilla*, 329 N.W.2d at 266. The delay between the incident and the child's statement is typically attributable to the victim's status as a child. *See Nicholas E. Davis, Jr., Note, The Cry of an Abused Child: Ohio's Expansion of the Excited Utterance Exception to the Hearsay Rule*, 14 U. DAYTON L. REV. 399, 407-10 (1989). First, children tend to repress incidents of sexual abuse. *Id.* Second, the abused child is unlikely to report the incident to any other person besides his mother. *Id.* The attributes of children tend to reduce the possibility that a statement is the product of conscious fabrication, even as the time period between the event and the statement lengthens. *Id.* Young children are much less likely to reassess and calculate the effects of their statements. *Id.*; *see also State v. Bult*, 351 N.W.2d 731, 736 (S.D. 1984) (holding that young child's lack of capacity to fabricate justified broad approach to admissibility); *cf. Kilgore v. State*, 340 S.E.2d 640, 643 (Ga. Ct. App. 1986) (stating that no fixed time period should be applied when dealing with child sexual abuse victims); *State v. Creighton*, 462 A.2d 980, 982 (R.I. 1983) (holding that less demanding time requirement should be used when dealing with statement of young sexual abuse victim).

⁵⁸ *See State v. Wagner*, 508 N.E.2d 164, 165 (Ohio Ct. App. 1986) (admitting statement of three-year-old victim). A majority of courts appear to express the most concern for victims ranging in age from two to eleven years. *See, e.g., People v. Kreiner*, 329 N.W.2d 716, 718 (Mich. 1982) (reviewing admission of six-

tics, abilities, knowledge, and inexperience of young children have been the driving force behind the efforts of courts to admit the hearsay statements of child victims.⁵⁹ Furthermore, a young child's lack of knowledge of sex, combined with the lack of vocabulary to explain precisely what took place, support a more flexible interpretation of the excited utterance exception.⁶⁰ These factors are not present with the sixteen-year-old *Heflin* victim.

In addition to stretching the logic of the excited utterance exception, the *Heflin* decision will have a potentially dangerous effect when used as precedent.⁶¹ The court's current view suggests that, absent strong countervailing interests, precedent should be followed.⁶² When one considers society's growing intolerance of sex crimes, a strong interest logically weighs in favor of prosecuting these offenders.⁶³ This suggests that decisions relaxing evidentiary requirements in order to aid prosecutions will not only stand but will continue to grow. The *Heflin* decision is dangerous in this manner, because it suggests the possibility that the excited utterance exception has no time boundary.⁶⁴ The reliability and trustworthiness of evidence brought in as an excited utterance is already in doubt with the *Heflin* decision. As the reliability of evidence is

year-old victim's statement); *State v. Roy*, 333 N.W.2d 398, 400 (Neb. 1983) (addressing statement of two-year-old victim).

⁵⁹ See Davis, *supra* note 57, at 409-12. Children usually do not comprehend that something wrong has occurred. *Id.*

⁶⁰ See *Wagner*, 508 N.E.2d at 167. Children's lack of communication skills, reflective powers, and understanding supports the trustworthiness of their statements, especially in sex-related cases. *Id.*

⁶¹ See Sheryl K. Peterson, Comment, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 819 (1983) (stating that extension of excited utterance exception to "meet need" of child sexual abuse cases may serve as precedent for "unintended and unwarranted liberal application" of exception in other areas).

⁶² See *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 634-37 (Miss. 1991).

⁶³ See Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 185-89 (1991).

⁶⁴ See Teree E. Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 LOY. U. CHI. L.J. 299, 315-19 (1979). Psychological research substantiates the proposition that only seconds are needed between an incident and an individual's declaration before reliability is substantially reduced. *Id.* at 315.

eroded by the continued abuse of the excited utterance exception, constitutional problems may arise with respect to the defendant's right of confrontation.⁶⁵

One can reasonably argue that *Heflin* will be limited to cases involving sexual offenses. However, the wide-open nature of the decision prevents any certainty in this regard. For instance, the court did not indicate whether the *Heflin* interpretation will apply to adult victims. Noticeably absent was any discussion of the applicability of the "tender years" exception to future litigation involving younger victims.

In addition to these concerns, the court's opinion suggests an uncertainty in its own analysis. The court appears to rely more upon its pre-rule approach than upon the excited utterance exception.⁶⁶ Additionally, the court found the *Heflin* victim's statement admissible as both a prior consistent statement and as an excited utterance exception.⁶⁷

⁶⁵ See Anna Frissell & James M. Vukelic, *Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of a Child's Out-of-Court Statements in the Prosecution of Child Sexual Abuse Cases in North Dakota*, 66 N.D. L. REV. 599, 604-14 (1990). The confrontation clause requires that a court faced with an extra-judicial statement inquire as to the reliability or trustworthiness of the statement. *Id.* at 603 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). The United States Supreme Court has held that the reliability of an out-of-court statement may be inferred when the statement falls within a "firmly rooted hearsay exception" or "has particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Supreme Court has declared the excited utterance exception to be firmly rooted; however, the question is left open as to whether the abuse of an exception can support the inference of reliability. See *Idaho v. Wright*, 497 U.S. 809, 820 (1990) (stating that "totality of circumstances" should be such that substantial "guarantees of trustworthiness" are so great as to make cross-examination superfluous). See generally Goldman, *supra* note 52, at 453-60 (questioning theory that foundations of excited utterance exception guarantee trustworthiness and reliability).

⁶⁶ See *Heflin v. State*, 643 So. 2d 512, 519 (Miss. 1994). The court first stated the criteria for the excited utterance exception. *Heflin*, 643 So. 2d at 519. To get around the substantial time lapse the court turned to the pre-rule *Cunningham* and *Williams* approach. *Id.*; see *supra* notes 24-30 and accompanying text.

⁶⁷ *Heflin*, 643 So. 2d at 520. The court determined that the girl's statement also qualified under Mississippi Rule of Evidence 801(d)(1)(B). *Id.* The cross-examination of the victim attempted to show that she fabricated the entire incident. *Id.* Admission of the victim's statement under this exception did not require the court to exaggerate or manipulate 801(d)(1)(B) of the Mississippi Rules of Evidence in any manner. *Id.* The court did not present any reasons why it did not simply choose this route, rather than extending the excited utterance exception in

IV. CONCLUSION

The problems inherent in prosecuting these particular types of cases demand that the court adopt a particular and wholly separate approach. The "tender years" exception is quite possibly the appropriate vehicle by which the court might advance its policy of admitting the hearsay statements of child sexual abuse victims. However, the "tender years" exception would not have been applicable in the *Heflin* case due to the victim's age. If the court desires to apply the "tender years" philosophy to victims above the age of fourteen, then the court should either outline a new exception or extend the age limit.⁶⁸

The "tender years" exception provides trial courts with the discretion necessary to effectively address the issue without manipulating the excited utterance exception.⁶⁹ Under the "tender years" exception, the trial court would not have to find

the manner that it did. One can speculate as to whether the court had some hidden agenda behind its decision. Possibly, the court, in its attempt to aide these types of prosecutions, was forecasting a case in which the victim fails to testify.

⁶⁸ See MISS. R. EVID. 803(25) advisory committee's cmt. 25. The comment to the "tender years" exception provides factors for the court to consider when determining the issue of reliability. *Id.* The factors are:

1. whether there is an apparent motive on declarant's part to lie;
2. the general character of the declarant;
3. whether more than one person heard the statements;
4. whether the statements were made spontaneously;
5. the timing of the declarations;
6. the relationship between declarant and the witness;
7. the [remoteness of the] possibility [that] the declarant's . . . recollection is [faulty];
8. certainty that the statements were made;
9. the credibility of person testifying about the statements;
10. the age or maturity of the declarant;
11. whether suggestive techniques were used in eliciting the statement;
- and
12. whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated [the story].

Id. The application of these factors to children above the age of fourteen appears feasible. Undoubtedly, different results will arise when the factors are applied to older declarants, but this is reasonable considering the different capabilities, experience, and knowledge of children.

⁶⁹ See MISS. R. EVID. 803(25).

the spontaneity and excited state necessary to justify admission under the excited utterance exception.⁷⁰

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⁷⁰ See MISS. R. EVID. 803(25). The trial court is required to conduct a hearing outside the presence of the jury. *Id.* The key to admissibility under the exception is that circumstances surrounding the declaration present adequate guarantees of trustworthiness. *Id.* This requirement ensures that the admission of the statement comports with the requirements of a defendant's right to confrontation under the Sixth Amendment. See *California v. Green*, 399 U.S. 149, 153-70 (1970) (stating that Sixth Amendment hearsay "overlap" is not complete); see *supra* note 63 and accompanying text.

RECENT DECISIONS

CRIMINAL LAW—APPEALS—MISSISSIPPI ALLOWS ANY PARTY TO FILE MOTION FOR SUBSTITUTION UPON DEATH OF CRIMINAL DEFENDANT AND ADOPTS ABATEMENT *AB INITIO* AS DEFAULT RULE

In February 1991, a jury convicted Francis Ray Gollott for the manslaughter of his wife, Billie Diane Gollott.¹ The court sentenced Gollott to fifteen years in prison, with three years suspended.²

While Gollott perfected his appeal to the Mississippi Supreme Court,³ his three adoptive daughters sued him for the wrongful death of his wife.⁴ The trial court, however, deferred trying this civil suit until the conclusion of Gollott's appeal of the manslaughter conviction.⁵

On November 16, 1993, prior to the resolution of his pending appeal, Gollott died.⁶ Gollott's attorney promptly filed a Motion for a Decision on the Merits on November 29, 1993.⁷

¹ *Gollott v. State*, 646 So. 2d 1297, 1299 (Miss. 1994). The State had previously tried Gollott for the murder of his wife. *Gollott*, 646 So. 2d at 1299. This initial trial resulted in a hung jury, and consequently, the State pursued a manslaughter conviction. *Id.*

² *Gollott*, 646 So. 2d at 1299. Gollott spent the length of his imprisonment in the custody of the Mississippi Department of Corrections. *Id.*

³ *Id.* The parties concluded their briefing on June 15, 1992. *Id.*

⁴ *Id.* Billie Diane Gollott's daughters, Stacy Pitale, Tracy Pratt, and Marla Dawn Gollott, brought the wrongful death action against him. *Id.*

⁵ *Id.*

⁶ *Id.* Gollott died of a heart attack. *Id.*

⁷ *Gollott*, 646 So. 2d at 1299. Gollott's attorney argued that rendering his appeal moot by allowing the manslaughter conviction to stand "without full adju-

On December 6, 1993, the State countered by filing a Suggestion of Death and Motion to Dismiss Appeal.⁸ These filings left the Mississippi Supreme Court to determine "[w]hether the vested right to a direct appeal terminates, leaving the conviction intact, upon the death of a defendant pending appeal?"⁹ The court also confronted the issue of whether Mississippi Supreme Court Rule 43(a) allowed a substituted party to proceed with an appeal in place of a deceased criminal defendant.¹⁰

After review of these motions, the Mississippi Supreme Court denied the State's motion to dismiss the appeal.¹¹ The court held that when a criminal defendant dies prior to the resolution of his pending appeal any party may file a motion for substitution, and in the event that no such motion is made, all prosecutorial proceedings abate from their inception.¹²

I. RELATED LAW

A. *Majority View*

1. *The Abatement Ab Initio Doctrine In General*

The abatement *ab initio* doctrine,¹³ established by the

dication on the merits" would be extremely prejudicial to his estate's defense in the wrongful death suit. *Id.*

⁸ *Id.* The State, relying on precedent, argued for dismissal of Gollott's appeal because his death rendered the appeal moot. *Id.* (citing *Berryhill v. State*, 492 So. 2d 288 (Miss. 1986), *overruled by* *Gollott v. State*, 646 So. 2d at 1304; *Haines v. State*, 428 So. 2d 590 (Miss. 1983), *overruled by* *Gollott v. State*, 646 So. 2d at 1304).

⁹ *Id.* at 1299.

¹⁰ *Id.* at 1301.

¹¹ *Id.* at 1305.

¹² *Gollott*, 646 So. 2d at 1304. The court held that Rule 43(a) allowed substitution in criminal cases as well as civil cases as long as the parties made the proper motions. *Id.* (construing MISS. SUP. CT. R. 43(a)). The court declared that abatement *ab initio* would henceforth be the default rule in the absence of such motions. *Id.*

¹³ See generally BLACK'S LAW DICTIONARY 6 (6th ed. 1990) (defining *ab initio* as: "[f]rom the beginning; from the first act; from the inception").

United States Supreme Court in *Durham v. United States*,¹⁴ provided that the death of a criminal defendant pending appeal of his conviction abated not only the appeal but all prosecutorial proceedings.¹⁵ The federal courts,¹⁶ as well as the

¹⁴ 401 U.S. 481 (1971), *overruled by* *Dove v. United States*, 423 U.S. 325 (1976).

¹⁵ *Durham*, 401 U.S. at 483; *see also* *Fletcher v. Bryan*, 361 U.S. 126, 126 (1959) (remanding case to lower court with instructions to dismiss petition as moot due to defendant's death). *See generally* 24 C.J.S. *Criminal Law* § 1698 (1989) (asserting that defendant's death during pending appeal results in dismissal of appeal). The defendant in *Durham* died after filing a petition for writ of certiorari for review of his conviction for possession of counterfeit currency. *Durham*, 401 U.S. at 481. While noting the ambiguity in this area of the law, the Court lauded the federal courts' adoption of abatement *ab initio* and instructed the lower court to dismiss the indictment. *Id.* at 483. The Court reasoned that the distinction between a direct appeal and certiorari was unimportant because the death of the criminal defendant would prevent review of the conviction on the merits. *Id.* at 483 n.*. The result was an abatement from the beginning of the proceedings even though the case involved a petition for certiorari rather than an appeal of right. *Id.* at 483. Justice Blackmun wished to dismiss the petition for writ of certiorari rather than the indictment. *Id.* at 484 (Blackmun, J., dissenting). Blackmun maintained that since the defendant in *Durham* had no actual right to an appeal to the United States Supreme Court, the certiorari proceedings were moot. *Durham*, 401 U.S. at 484 (Blackmun, J., dissenting).

The United States Supreme Court employed the abatement *ab initio* doctrine as early as 1888. *See List v. Pennsylvania*, 131 U.S. 396, 396 (1888) (dismissing writ of error and holding that cause abated upon death of defendant). Numerous early decisions said nothing more than that the cause abated upon the defendant's death. *See, e.g., Johnson v. State*, 214 U.S. 485, 485 (1909) (stating that appeal abated upon death of defendant and dismissing case); *Menken v. Atlanta*, 131 U.S. 405, 405 (1889) (considering cause abated upon death of plaintiff in error); *Rossi v. United States*, 21 F.2d 747, 747 (8th Cir. 1927) (stating that death of plaintiff in error abated causes); *McGovern v. United States*, 280 F. 73, 76 (7th Cir. 1922) (finding that judgments abated as to defendant who died prior to hearing); *Pino v. United States*, 278 F. 479, 483 (7th Cir. 1921) (finding that death of defendant abated judgment); *United States v. Dunne*, 173 F. 254, 258 (9th Cir. 1909) (holding that entire action abated upon defendant's death); *accord Crooker v. United States*, 325 F.2d 318, 319 (8th Cir. 1963) (holding that causes abated when defendant died during pendency of two criminal appeals); *cf. Mintzes v. Buchanon*, 471 U.S. 154, 154 (1985) (vacating order granting writ of certiorari upon respondent's death and dismissing petition for certiorari); *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983) (holding that death of defendant prior to filing of notice of appeal abated prosecution *ab initio* where defendant possessed appeal of right from conviction). Other cases have remanded such cases to lower courts with instructions "for such disposition as law and justice require." *Singer v. United States*, 323 U.S. 338, 346 (1945); *accord United States*

majority of state courts,¹⁷ have adopted this doctrine as the general rule.¹⁸ However, the United States Supreme Court modified *Durham* in the case of *Dove v. United States*¹⁹ in which it held that the death of a defendant during a petition for certiorari rendered only the petition proceedings moot and thus, allowed the conviction to stand.²⁰

2. Lower Federal Court Application of Abatement Ab Initio

The lower federal courts have unanimously employed the abatement *ab initio* doctrine.²¹ The Fifth Circuit Court of Ap-

v. Johnson, 319 U.S. 503, 520 (1943) (remanding to lower court "for proper disposition in accordance with" majority opinion).

¹⁶ See generally Lori R. Dickerman, *Disposition of a Federal Criminal Case When Defendant Dies Pending Appeal*, 13 U. MICH. J.L. REF. 143, 143 (1979) (noting that federal courts followed traditional rule that all proceedings abated when criminal defendant died pending appeal from conviction); John H. Derrick, Annotation, *Abatement Effects of Accused's Death Before Appellate Review of Federal Criminal Conviction*, 80 A.L.R. FED. 446, 448-49 (1986) (listing federal court decisions employing abatement *ab initio* doctrine).

¹⁷ See generally Tim A. Thomas, Annotation, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R.4TH 189, 192-96 (1990) (listing state court decisions applying majority view that death of criminal defendant during pending appeal abates proceedings from inception).

¹⁸ See generally 24 C.J.S. *Criminal Law* § 1685 (1989) (stating that majority rule abates appeal and vacates judgment where accused dies during pendency of appeal); J.P. Ludington, Annotation, *Comment Note—When Criminal Case Becomes Moot so as to Preclude Review of or Attack on Conviction or Sentence*, 9 A.L.R.3D 462, 496-97 (1966) (listing federal and state decisions applying majority view that death of criminal defendant during pending appeal abates proceedings from inception).

¹⁹ 423 U.S. 325 (1976).

²⁰ *Dove*, 423 U.S. at 325; see also *Warden v. Palermo*, 431 U.S. 911, 911 (1977) (citing *Dove* as basis for dismissing petition for certiorari). The Court dismissed the petition for certiorari and partially overruled *Durham* with virtually no explanation. *Dove*, 423 U.S. at 325. Although the Court failed to clarify the logic behind the holding, the *Dove* decision seemed to fall in line with the reasoning of Justice Blackmun's dissent in *Durham*. See *supra* note 15 and accompanying text. Though *Dove* initially appeared confusing, the federal courts unanimously concluded that it overruled *Durham* only with respect to petitions for writ of certiorari. See, e.g., *United States v. Moehlenkamp*, 557 F.2d 126, 127 (7th Cir. 1977) (stating that *Dove* applied solely to petitions for writ of certiorari).

²¹ See Derrick, *supra* note 16, at 448-49. In applying the abatement *ab initio* doctrine, courts have generally dismissed the appeal and remanded the case to

peals in *United States v. Pauline*²² clearly displayed the unanimity of the federal courts' employment and interpretation of the doctrine after *Dove*.²³ The *Pauline* court explained that all federal courts have interpreted *Dove* as applying solely to petitions for certiorari.²⁴ Since *Pauline* involved a direct crim-

the lower court with instructions to vacate the judgment and dismiss the indictment. See, e.g., *United States v. Bechtel*, 547 F.2d 1379, 1380 (9th Cir. 1977) (interpreting *Dove* as applicable only to dispositions of petitions for writ of certiorari while dismissing appeal, remanding case, and instructing district court to dismiss indictment); *United States v. Janney*, 525 F.2d 1208, 1209 (5th Cir. 1976) (remanding case with directions for district court to vacate judgment and dismiss indictment because criminal appellant died); *United States v. Hudson*, 460 F.2d 321, 321 (5th Cir. 1972) (employing abatement *ab initio* doctrine, remanding case, and instructing district court to vacate judgment and dismiss indictment when presented with criminal appellant's official death certificate). Additionally, some courts have opined that fines should abate at the death of a criminal defendant. *United States v. Pomeroy*, 152 F. 279, 282 (C.C.S.D.N.Y. 1907), *rev'd on other grounds sub nom.* *United States v. New Cent. & H.R.R.*, 164 F. 324 (2d Cir. 1908). Courts have distinguished fines from civil damages, which are enforceable against the estate, reasoning that fines are penalties rather than compensation for injuries. Dickerman, *supra* note 16, at 144. See generally Edwina D. Warner, Note, *The Abatement of Criminal Fines upon Death of Defendant: Punishment, Precedent, and Policy*, 11 MEM. ST. U. L. REV. 67, 67 (1980) (noting that abatement of all criminal proceedings upon death of criminal defendant includes abatement of unpaid criminal fines).

²² 625 F.2d 684 (5th Cir. 1980).

²³ See Derrick, *supra* note 16, at 448-49 (listing circuit court cases following general rule that prosecution abates from inception). Scholars have estimated that this situation arises less than ten times annually. Dickerman, *supra* note 16, at 143 n.1.

²⁴ *Pauline*, 625 F.2d at 685. The court noted that the three other circuit courts which previously addressed *Dove* found its holding applicable only to petitions for certiorari. *Id.* at 685 (citing *United States v. Littlefield*, 594 F.2d 683 (8th Cir. 1979); *United States v. Moehlenkamp*, 557 F.2d 126, 127 (7th Cir. 1977); *United States v. Bechtel*, 547 F.2d 1380 (9th Cir. 1977)). In adhering to the abatement *ab initio* doctrine, the court relied upon the distinction between appeals of right and petitions for certiorari identified by the Seventh Circuit in *Moehlenkamp*. *Id.* (citing *Moehlenkamp*, 557 F.2d at 128).

Moehlenkamp involved a defendant, convicted of conspiracy to distribute controlled substances, who had died while his appeal was pending. *Moehlenkamp*, 557 F.2d at 127. The *Moehlenkamp* court maintained that dismissing a petition for certiorari did not prejudice a deceased petitioner because he already had undergone the appellate review to which he was entitled. *Id.* at 128. In dismissing all proceedings against the deceased defendant, the court contrasted the notion of the non-prejudicial effect of dismissing a petition for certiorari by stating that:

inal appeal rather than a petition for certiorari, the Fifth Circuit Court of Appeals ultimately held that all proceedings abated from their inception.²⁵

3. State Court Application of Abatement Ab Initio

The majority of state courts have followed the rule that all prosecutorial proceedings are abated if a criminal defendant dies pending direct appeal of his conviction.²⁶ These jurisdictions have supported adherence to the doctrine by explaining that neither upholding the convictions nor maintaining the appeal would further the goals of the penal system.²⁷ Likewise, most jurisdictions have maintained that while the interests of the accused's family in restoring his good reputa-

[W]hen an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence."

Id. (alteration in original) (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). Additionally, the *Moehlenkamp* court noted that when an appeal in a civil case becomes moot, setting aside the lower court's ruling and remanding with instructions to dismiss is mandatory. *Id.* at 127 (citing *Duke Power Co. v. Greenwood Co.*, 299 U.S. 259, 267 (1936)). The *Moehlenkamp* court found the disposition of a criminal appeal after the defendant's death analogous to that of a civil appeal, stating that no reason existed for different treatment of the two scenarios. *Id.* at 127. See generally Francis M. Dougherty, Annotation, *Effect of Death of Party to Divorce Proceeding Pending Appeal or Time Allowed for Appeal*, 33 A.L.R.4TH 47, 54-76 (1984) (discussing disposition of appeals upon death of party to divorce proceeding).

²⁵ *Pauline*, 625 F.2d at 685; see also *United States v. Littlefield*, 594 F.2d 682, 683 (8th Cir. 1979) (vacating conviction of criminal defendant who died during pendency of his appeal); *United States v. Bechtel*, 547 F.2d 1379, 1380 (9th Cir. 1977) (finding *Dove* applicable only to dispositions of petitions for certiorari).

²⁶ See *Thomas*, *supra* note 17, at 192-96 (listing states adhering to rule that death of criminal defendant pending appeal abates all proceedings); see also *Williams v. State*, 602 So. 2d 676, 676 (Fla. 1992) (abating prosecutorial proceedings *ab initio* upon presentation of criminal defendant's death certificate).

²⁷ See, e.g., *Hartwell v. State*, 423 P.2d 282, 284 (Alaska 1967) (stating that death of criminal defendant pending appeal renders sentencing impracticable); *State v. Griffin*, 592 P.2d 372, 373 (Ariz. 1979) (opining that state had no interest in upholding conviction upon death of accused). Generally, courts have viewed the goals of the penal system as incapacitation, rehabilitation, retribution and deterrence. *Dickerman*, *supra* note 16, at 144.

tion²⁸ do not warrant continuation of the appeal, they do justify abatement of a conviction called into question by an appeal.²⁹

B. *Minority Views*

1. *General Minority View*

Certain states have held that the death of a criminal defendant pending appeal abated the appeal, but left the prior conviction intact as an adjudication on the merits.³⁰ The Indiana Supreme Court, in *Whitehouse v. State*,³¹ justified the minority view by explaining that the proceeding could benefit neither a state interest nor the defendant.³² The *Whitehouse* court opined that once convicted a criminal defendant loses his presumption of innocence³³ and noted that the appellant did not suggest that the conviction adversely affected the interests of third parties.³⁴

²⁸ See Dickerman, *supra* note 16, at 153 (suggesting that vacating conviction relieves deceased defendant's family of stigma associated with conviction). But see Lynn J. Splitok, Note, *State v. McDonald: Death of a Criminal Defendant Pending Appeal in Wisconsin—The Appeal Survives*, 1989 WIS. L. REV. 811, 828-29 (stating that abatement *ab initio* does little to restore deceased defendant's reputation).

²⁹ See, e.g., *State v. Carter*, 299 A.2d 891, 894 (Me. 1973) (stating that family's interest in reputation of accused merited dismissal of all proceedings called into question by appeal).

³⁰ See Thomas, *supra* note 17, at 197 (listing cases applying general minority view).

³¹ 364 N.E.2d 1015 (Ind. 1977).

³² *Whitehouse*, 364 N.E.2d at 1016. The court dismissed the deceased defendant's appeal, reasoning that:

We do not see that the dismissal of the appeal, without more, denies any rights granted or protected by the statutes or the constitutional provisions. Such rights were personal to and exclusively those of the defendant. Although a criminal conviction carries a definite "fall-out" that extends beyond the person of the defendant, we are aware of no right to be free of such, even if such conviction be erroneous. I may no more appeal my brother's conviction than I may enter his guilty plea.

Id.

³³ *Id.* The court added that dismissing the proceedings from their inception would benefit neither party and would be more likely to adversely affect the rights of the heirs of the defendant rather than advance them. *Id.*

³⁴ *Id.* The court clearly acknowledged that dismissing the appeal as moot and

The Mississippi Supreme Court vividly displayed its adherence to the minority view in the case of *Haines v. State*.³⁵ Relying on the rationale espoused in *Whitehouse*, the *Haines* court, following the State's motion to dismiss, stated that the minority view was sound.³⁶ Accordingly, the court overruled the motion to abate and vacate the conviction and sustained the State's motion to dismiss the appeal as moot.³⁷

Mississippi displayed its steadfastness to the minority view once again in *Berryhill v. State*.³⁸ After briefly presenting the majority and minority views, the Mississippi Supreme Court declined the opportunity to follow abatement *ab initio* and thus, enter the majority.³⁹ Relying on *Haines*, the court dismissed the deceased defendant's appeal as moot and allowed the conviction to stand.⁴⁰

allowing the conviction to stand would be detrimental to third party interests in certain instances. *Id.* *Whitehouse*, however, did not present such an issue; thus, the court refused to consider this argument. *Id.* The court explained that "[i]t, therefore, is our opinion that it would be unwise for us to reach out to adopt a policy favoring survivor interests of questionable validity." *Id.*

³⁵ 428 So. 2d 590 (Miss. 1983), *overruled by* Gollott v. State, 646 So. 2d 1297 (Miss. 1994).

³⁶ *Haines*, 428 So. 2d at 591.

³⁷ *Id.* at 592. Additionally, the Mississippi Supreme Court coined a "mad dog killer" hypothetical. *Id.* at 592 n.1. The court noted that under the majority rule, courts would dismiss the conviction and indictment of a person convicted of capital murder if the defendant died during pendency of appeal. *Id.* The court reasoned that such a result would be an "obvious miscarriage of justice." *Id.*

³⁸ 492 So. 2d 288 (Miss. 1986), *overruled by* Gollott v. State, 646 So. 2d 1297 (Miss. 1994).

³⁹ *Berryhill*, 492 So. 2d at 288-89. Adhering to the rationale espoused in *Haines*, the court dismissed the appeal as moot but refused to abate all proceedings from their inception. *Id.* at 289 (citing *Haines v. State*, 428 So. 2d 590, 592 (Miss. 1983), *overruled by* Gollott v. State, 646 So. 2d 1297 (Miss. 1994)). For discussion of *Haines*, see *supra* note 37 and accompanying text.

⁴⁰ *Berryhill*, 492 So. 2d at 288-89. A jury convicted Berryhill of possessing a controlled substance and sentenced him to 20 years imprisonment and a \$13,000 fine. *Id.* at 288. The State depended upon the precedent established by *Haines* while Berryhill's attorney relied heavily upon the majority rule set out in *United States v. Pauline*. *Id.* Berryhill's attorney maintained that:

Death should not deprive an innocent person who has been wrongfully and illegally convicted of his right to clear his name on appeal. Therefore, this Court should reverse its ruling in *Haines*, and adopt the majority rule as set forth in [United States v.] Pauline [625 F.2d 684 (5th

2. *View That Continuation of the Appeal is Necessary to Protect Societal and Survivor Interests*

Some states have taken the position that continuation of the appeal after the criminal defendant's death is necessary to protect the interests of both the defendant's estate and society.⁴¹ Generally, these interests included resolution of the costs of prosecution, the defendant's family's entitlement to a final judgment, and inheritance rights.⁴²

In *State v. McDonald*,⁴³ the Wisconsin Supreme Court supported its adoption of this view by opining that "[i]t is not his appeal which is moot . . . [,] but rather it is his death which is moot because he did not take the potential errors of our justice system into the grave with him."⁴⁴

Cir. 1980)].

Id. (alteration in original)

In *Jordan v. McKenna*, 573 So. 2d 1371 (Miss. 1990), the Mississippi Supreme Court held that a criminal conviction collaterally estopped a defendant from relitigating the same fact issues in a subsequent civil action. *Jordan*, 573 So. 2d at 1377. The court supported its holding by asserting that courts should give considerable deference to a criminal conviction because the standard of proof in a criminal case is significantly greater than that in a civil case. *Id.* at 1376. The standard of proof in a criminal prosecution has been "beyond a reasonable doubt" while the civil standard has generally been "by a preponderance of the evidence." *Id.* The court listed numerous jurisdictions which followed the rule that a criminal conviction estops a defendant from relitigating the same fact issues in a civil suit. *Id.* A jury in the Circuit Court of Oktibbeha County convicted John S. Jordan for the rape of Marie Redus. *Id.* at 1374. On direct appeal, the Mississippi Supreme Court affirmed this conviction. *Jordan*, 573 So. 2d at 1374 n.2 (citing *Jordan v. State*, 543 So. 2d 191 (Miss. 1989)).

⁴¹ See, e.g., *Commonwealth v. Culpepper*, 293 A.2d 122, 124 n.3 (Pa. 1972) (allowing appeal to continue after defendant's death); *Commonwealth v. Walker*, 288 A.2d 741, 742 n.* (Pa. 1972) (noting importance of full review of criminal proceeding although defendant died). But see *Splitek*, *supra* note 28, at 827-35 (criticizing *McDonald* in favor of abatement *ab initio* rule). In *Walker*, Justice Pomeroy maintained that the record revealed nothing about the defendant's survivors, and thus, the court's holding was inappropriate. *Walker*, 288 A.2d 741, 744-45 (Pomeroy, J., dissenting).

⁴² See *Splitek*, *supra* note 28, at 819.

⁴³ 424 N.W.2d 411 (Wis. 1988).

⁴⁴ *McDonald*, 424 N.W.2d at 415 (Heffernan, J., concurring). Chief Justice Heffernan found these potential errors capable of adversely affecting relatives, friends, reputation, the legal system and society in general. *Id.* (Heffernan, J., concurring). He noted that abating the appeal may decisively rule upon important

3. View Allowing Substitution By Any Party With Abatement Ab Initio as Default

In *State v. McGettrick*,⁴⁵ the Supreme Court of Ohio found shortcomings in both the majority and minority views.⁴⁶ The court found that dismissing the appeal and allowing the conviction to stand would deprive the defendant of his constitutional right to direct review of his conviction.⁴⁷ Additionally, the court believed that it would be contrary to the interests of the State to allow all proceedings to abate from their inception.⁴⁸ Furthermore, the court declared that significant pecuniary interests of the defendant's estate might be jeopardized if only the appeal abated.⁴⁹ The *McGettrick* court determined that allowing substitution for the deceased defendant was the most judicious view.⁵⁰ If, however, no interested party requested substitution, the court employed the doctrine of abatement *ab initio* as a default rule.⁵¹

collateral matters without chance for review. *Id.* (Heffernan, J., concurring). The *McDonald* court maintained that a felony conviction would effectively preclude defendant's survivors from receiving numerous benefits. *Id.* at 414. Continuation of the appeal would eliminate the need for a separate civil case if the court affirmed the conviction; however, if the court reversed the conviction, any party could initiate civil proceedings. *Id.*

⁴⁵ 509 N.E.2d 378 (Ohio 1987).

⁴⁶ *McGettrick*, 509 N.E.2d at 380-81.

⁴⁷ *Id.* at 380. The court noted that allowing the conviction to stand would violate the deceased defendant's fundamental rights. *Id.*

⁴⁸ *Id.* The court opined that the people of the State had an interest in preserving a conviction. *Id.*; see also *Splitek*, *supra* note 28, at 833 (suggesting that purported state interest in retribution, even though defendant died, detrimentally affects defendant's innocent family members).

⁴⁹ *McGettrick*, 509 N.E.2d at 381 n.4 (citing *Wetzel v. Ohio*, 371 U.S. 62 (1962); *State v. Jones*, 551 P.2d 801, 804 (Kan. 1976)). The court noted that under the majority view, all prosecutorial proceedings and fines abated upon defendant's death, but the legal expenses remained. *Id.* These expenses affected inheritance rights of the defendant's family. *Id.*; see also *Dickerman*, *supra* note 16, at 149 (noting that conviction of certain crimes results in denial of certain social welfare benefits).

⁵⁰ *McGettrick*, 509 N.E.2d at 382. Either the State or defendant's personal representative may file for substitution. *Id.* at 381.

⁵¹ *Id.* at 382. The Ohio Supreme Court construed the Ohio appellate rule dealing with substitution of parties as allowing substitution in the event of a criminal defendant's death pending appeal. *Id.* at 381 (construing OHIO R. APP. P.

II. *GOLLOTT V. STATE*

The case of *Gollott v. State*⁵² presented the Mississippi Supreme Court with the issue of whether to adopt the majority view that the death of a criminal defendant during pendency of appeal abated all prosecutorial proceedings from their inception.⁵³ The court focused its opinion on the historical treatment of situations where criminal defendants died during their appeals.⁵⁴ Beginning with *Haines* and *Berryhill*, the court acknowledged its previous adherence to the minority view that the death of a criminal defendant pending appeal merely abated the appeal itself, leaving the conviction to stand as valid.⁵⁵ The court then synthesized the federal application in *Durham* and *Dove* concluding that the abatement *ab initio* doctrine applied only to direct appeals rather than to petitions for certiorari.⁵⁶ Next, with a review of *Pauline*, the court not-

29(A)).

Pursuant to the establishment of the Court of Appeals of the State of Mississippi, MISS. CODE ANN. § 9-4-1 (Supp. 1994), the Mississippi Supreme Court promulgated the Mississippi Rules of Appellate Procedure. Order adopting the Mississippi Rules of Appellate Procedure, reprinted in MISS. R. CT. 171-72 (West 1995) [hereinafter MISSISSIPPI RULES]. In its order, the Mississippi Supreme Court declared that the appended Official Comments to each Rule gave "authoritative guidance to the correct interpretation of these Rules." MISSISSIPPI RULES, at 172. Mississippi Rule of Appellate Procedure 43(a) effectively superseded Mississippi Supreme Court Rule 43(a) on January 1, 1995. Although the two rules differ only slightly, the Official Comment to Mississippi Rule of Appellate Procedure 43(a) clearly states that "[i]t applies to civil cases only, and not to criminal cases." See MISS. R. APP. P. 43(a) cmt. (citing *Berryhill v. State*, 492 So. 2d 288 (Miss. 1986), overruled by *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994)).

⁵² 646 So. 2d 1297 (Miss. 1994).

⁵³ *Gollott*, 646 So. 2d at 1299. For a brief discussion of the trial court's handling of the case, see *supra* note 1 and accompanying text.

⁵⁴ *Gollott*, 646 So. 2d at 1299-1304.

⁵⁵ *Id.* at 1299 (citing *Berryhill v. State*, 492 So. 2d 288 (Miss. 1986), overruled by *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994)); *Haines v. State*, 428 So. 2d 590 (Miss. 1983), overruled by *Gollott v. State*, 646 So. 1297 (Miss. 1994)). For discussion of *Berryhill*, see *supra* notes 39, 40 and accompanying text. For a discussion of *Haines*, see *supra* note 37 and accompanying text.

⁵⁶ *Gollott*, 646 So. 2d at 1300 (citing *Dove v. United States*, 423 U.S. 325 (1976); *Durham v. United States*, 401 U.S. 481 (1971), overruled by *Dove v. United States*, 423 U.S. 325 (1976)). For discussion of *Dove*, see *supra* note 20 and accompanying text. For further discussion of *Durham*, see *supra* note 15 and

ed that the Fifth Circuit Court of Appeals had also held the abatement *ab initio* doctrine inapplicable to petitions for certiorari.⁵⁷ Moreover, the court found that *Whitehouse* provided justification for the minority view.⁵⁸ In discussing *McGettrick*, the court approved of Ohio's position which permitted substitution by any party and employed abatement *ab initio* in default.⁵⁹ Finally, the court admitted that nothing in Rule 43(a) prohibited substitution of a party for a criminal defendant who died pending appeal.⁶⁰

accompanying text.

⁵⁷ *Gollott*, 646 So. 2d at 1300 (citing *United States v. Pauline*, 625 F.2d 684, 685 (5th Cir. 1980)). For further discussion of *Pauline*, see *supra* notes 24, 25 and accompanying text.

⁵⁸ *Gollott*, 646 So. 2d at 1301 (citing *Whitehouse v. State*, 364 N.E.2d 1015, 1016 (Ind. 1977)). The court maintained its manifest agreement with *Whitehouse* by stating, "it is evident that although we have never before rendered an opinion specifically addressing such a request, full review of the judgment after death of the defendant pending appeal has been considered by this Court, and disapproved of." *Id.* For a discussion of *Whitehouse*, see *supra* notes 32-34 and accompanying text.

In *Jordan*, the court found that a criminal conviction estopped a defendant from relitigating the same facts in a civil proceeding. *Id.* (citing *Jordan v. McKenna*, 573 So. 2d 1371 (Miss. 1990)). For further discussion of *Jordan*, see *supra* note 40 and accompanying text. While *Jordan* specifically pertained to a criminal conviction for assault and rape, the court maintained that the same rationale would apply in the context of a criminal conviction for manslaughter and a wrongful death action. *Gollott*, 646 So. 2d at 1301-02 (citing MISS. CODE ANN. § 97-3-47 (1972); MISS. CODE ANN. § 11-7-13 (Supp. 1993); *Grinnell v. State*, 230 So. 2d 555 (Miss. 1970)). The court also addressed the res judicata effect of the pendency of an appeal. *Id.* at 1302 (citing *Smith v. Malouf*, 597 So. 2d 1299, 1301-02 (Miss. 1992)).

Furthermore, the State reviewed the disposition of such pending appeals by courts of other states. *Id.* at 1302-03 (citing *State v. McGettrick*, 509 N.E.2d 378, 380 (Ohio 1987); *State v. McDonald*, 424 N.W.2d 411, 415 (Wis. 1988)). For further discussion of *McDonald*, see *supra* note 44 and accompanying text. For discussion of *McGettrick*, see *supra* notes 47-51 and accompanying text. Likewise, the court outlined the policy arguments in favor of adopting the abatement *ab initio* doctrine. *Id.* at 1303 (citing *Wetzel v. Ohio*, 371 U.S. 62, 83 (1962); *State v. Jones*, 551 P.2d 801, 804 (Kan. 1976)).

⁵⁹ *Gollott*, 646 So. 2d at 1302-03.

⁶⁰ *Id.* at 1304-05. The Mississippi Supreme Court rule applicable to substitution of parties provides:

If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in this Court, the personal representative of the de-

Upon reviewing the numerous prior decisions, the Mississippi Supreme Court held that when a criminal defendant dies during his pending appeal, Mississippi henceforth would allow any party to file a motion for substitution.⁶¹ In the event that no one made such a motion, all prosecutorial proceedings would abate *ab initio*.⁶² The court reasoned that full review of a conviction was the only way to maintain its presumption of validity.⁶³ Finally, the court ruled that allowing substitution and adopting abatement *ab initio* as the default rule was the proper way to address public policy concerns.⁶⁴

III. DISCUSSION

In *Gollott*, the Mississippi Supreme Court allowed substitution for a deceased criminal defendant and adopted the majority rule of abatement *ab initio* as the default rule. The following section of this case note examines the consequences of *Gollott* on the legal system and criminal appeals in Missis-

ceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of this Court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as this Court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the lower court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed, substitution shall be effected in this Court in accordance with this Rule 43(a). If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed, substitution shall be effected in this Court in accordance with this Rule 43(a).

Id. at 1304 (quoting MISS. SUP. CT. R. 43(a) (adopted as MISS. R. APP. P. 43(a))).

⁶¹ *Id.* The court stated that since Rule 43(a) did indeed permit a substitute party in place of a criminal defendant, "abatement *ab initio* will hereafter be the default rule in the event no motion to substitute the deceased defendant is made." *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Gollott*, 646 So. 2d at 1304.

ssippi. More specifically, this section will discuss the impact of *Gollott* on public policy, the goals of the penal system, and the potential for confusion in the newly established Mississippi Court of Appeals.

A. *Public Policy Concerns Addressed*

The overwhelming public policy concerns⁶⁵ and the res judicata effect of a criminal conviction on a subsequent civil action⁶⁶ ultimately led to the demise of Mississippi's application of the minority view.⁶⁷ In allowing substitution by any party and adopting the abatement *ab initio* doctrine as a default rule,⁶⁸ the Mississippi Supreme Court struck a judicial balance between the interests of society and those of the accused's family.⁶⁹

First, the court is apparently acknowledging that appellate review is necessary for full adjudication.⁷⁰ Also, permitting substitution allows the defendant's family to proceed with the pending appeal and thus, attempt to restore his good name.⁷¹ Additionally, the accused's family is not being pecuniarily punished as it likely would have been if the conviction stood intact.⁷² In allowing the proceedings to abate, the defendant's family will avoid additional legal expenses.⁷³ Furthermore, abatement of the proceedings will not likely affect inheritance rights or government benefits.⁷⁴

The adoption of abatement *ab initio*, while not seen as an acquittal, nevertheless provides the family with some level of comfort through the restoration of the accused's reputation.⁷⁵ Additionally, Mississippi's new position promotes judicial

⁶⁵ See *supra* notes 28, 29, 33, 34, 44, 48, 49 and accompanying text.

⁶⁶ See *supra* notes 40, 44 and accompanying text.

⁶⁷ See *supra* note 61 and accompanying text.

⁶⁸ See *supra* note 61 and accompanying text.

⁶⁹ See *supra* notes 47-49 and accompanying text.

⁷⁰ See *supra* notes 24, 41, 44 and accompanying text.

⁷¹ See *supra* notes 28, 29 and accompanying text.

⁷² See *supra* notes 40, 49 and accompanying text.

⁷³ See *supra* note 49 and accompanying text.

⁷⁴ See *supra* note 44, 49 and accompanying text.

⁷⁵ See *supra* note 28.

economy by permitting the State to forego the expense of pursuing an unpunishable conviction.⁷⁶

B. *The Goals of the Penal System*

Adoption of the rule that all proceedings abate from their inception is logically more consistent with the goals of the legal system than the minority view.⁷⁷ Allowing a conviction to stand in light of the defendant's death does nothing to further the goals of the penal system.⁷⁸ Any interest in retribution will likely come at the expense of the deceased defendant's family members.⁷⁹ The abatement *ab initio* doctrine at least acknowledges that the issues have not been fully adjudicated.⁸⁰

C. *Minor Confusion for Mississippi Court of Appeals*

Initially, it appears that *Gollott* presents the Mississippi Court of Appeals with a slight dilemma. There is a direct conflict between the Mississippi Supreme Court's application of Mississippi Supreme Court Rule 43(a) in *Gollott*, and the Official Comment to Mississippi Rule of Appellate Procedure 43(a), which superseded the Supreme Court Rule.⁸¹ By promulgating the appellate rules subsequent to the *Gollott* decision, the court has created some minor confusion.⁸² However, the court can easily remedy this problem with an amended Official Comment.

IV. CONCLUSION

With *Gollott*, the Mississippi Supreme Court permitted any party to motion for substitution for a deceased criminal defendant and adopted abatement *ab initio* as the default

⁷⁶ See *supra* note 49 and accompanying text.

⁷⁷ See *supra* note 27 and accompanying text.

⁷⁸ See *supra* note 27 and accompanying text.

⁷⁹ See *supra* note 48 and accompanying text.

⁸⁰ See *supra* notes 24, 41, 44 and accompanying text.

⁸¹ See *supra* note 51 and accompanying text.

⁸² See *supra* note 51 and accompanying text.

rule. The adoption of this position illustrates the court's willingness to reevaluate its long-established position in the interests of fairness. Mississippi's new rule promotes the interests of both the deceased defendant's family and society and is more in tune with the goals of the penal system. While the applicable setting for implementing Mississippi's new doctrine will be quite infrequent, its use will likely bring about just results.

David Pureza

**INSURANCE—UNINSURED MOTORISTS—THE STATUTORY
MINIMUM AMOUNT OF COVERAGE IS THE AMOUNT
FOR WHICH THE PARTIES CONTRACTED**

An underinsured motorist caused an accident when he drove his vehicle into a vehicle driven by Guy Arthur Garriga.¹ As a result of the accident, Garriga suffered extensive and permanent injuries.² Garriga sued the underinsured motorist³ to recover damages incurred in the accident.⁴ Garriga later amended the complaint to join Nationwide, his personal insurance carrier, as a defendant.⁵ Garriga and the motorist settled.⁶ The sole issue remaining concerned the amount of coverage available under Garriga's personal poli-

¹ Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 660 (Miss. 1994).

² *Garriga*, 636 So. 2d at 660. Garriga was a police officer in Gulfport, Mississippi. *Id.* His injuries, which resulted in a 25% permanent disability, occurred as he responded to a burglary call. *Id.* Garriga incurred medical expenses in the amount of \$16,810.95. *Id.* The bulk of the medical expenses were for treating a ruptured disk. *Id.* The Gulfport Police Department had waived uninsured motorist insurance for its fleet. *Garriga*, 636 So. 2d at 660. The police department, through United States Fidelity and Guaranty Co. [hereinafter USF&G], paid Garriga \$25,198.68 in workers' compensation benefits as compensation for his injuries. *Id.*

³ *Id.* USF&G also wrote liability insurance for the negligent driver, Benjamin LeRoy Walker, Sr., in the minimum amount of \$10,000. *Id.* Garriga insured his two personal automobiles with Nationwide Mutual Insurance Co. [hereinafter Nationwide]. *Id.* His coverage provided uninsured motorist coverage in the amount of \$25,000 per policy. *Id.*

⁴ *Id.* In stipulations, the parties agreed that Garriga's damages totaled at least \$50,000. *Id.* at 661.

⁵ *Id.* at 660. USF&G then intervened to attempt to recover the workers' compensation benefits it paid to Garriga. *Id.*

⁶ *Id.* Under terms of the settlement, Walker agreed to pay Garriga \$10,000, the full limit of his liability policy. *Id.* USF&G agreed to forego pursuit of a lien on the workers' compensation benefits paid to Garriga. *Id.* In return, Garriga agreed not to file any further workers' compensation claims against USF&G. *Id.* The trial court dismissed USF&G and Walker from the suit. *Garriga*, 636 So. 2d at 660.

cies.⁷ Garriga claimed that Nationwide owed the full amount under the uninsured motorist provisions of the policies.⁸ Nationwide contended that it could offset the amount of coverage by workers' compensation benefits that Garriga received.⁹

The Harrison County Circuit Court granted Garriga's cross-motion for summary judgment.¹⁰ Nationwide appealed to the Mississippi Supreme Court, and the court reversed.¹¹ The court held that excess uninsured motorist coverage could be offset by workers' compensation payments received.¹² On Petition for Rehearing, the Mississippi Supreme Court held: Affirmed. The court ruled that the statutory minimum under the Uninsured Motorist Act was the amount of uninsured motorist coverage for which the parties contracted, and the uninsured motorist carrier could not use proceeds from other sources of insurance benefitting the insured to offset its liability under the uninsured motorist policy.¹³

⁷ *Garriga*, 636 So. 2d at 660. Nationwide paid Garriga \$15,000, the amount which was not in dispute. *Id.*

⁸ *Id.* Garriga contended that Nationwide owed him an additional \$25,000. *Id.* This amount represented the difference between the aggregate coverage under Garriga's policies, \$50,000, less the recovery from Walker, \$10,000. *Id.*

⁹ *Id.* at 661. Nationwide argued that it only owed Garriga \$15,000 because Garriga had already recovered \$10,000 from Walker and approximately \$25,000 from USF&G. *Id.* Nationwide had written a "limitation of liability" provision into its policies which allowed the offset. *Id.*

¹⁰ *Id.* at 660. The trial court held that Nationwide could not reduce Garriga's uninsured motorist coverage by the workers' compensation benefits he had received. *Id.* at 661. The clause in the policy which mandated the set-off was unclear and ambiguous when read in conjunction with the declarations. *Id.* Therefore, the set-off provision was void, and the trial court held that Nationwide owed Garriga the \$25,000 in dispute. *Id.*

¹¹ *Nationwide Mut. Ins. Co. v. Garriga*, No. 90-CA-0493, 1993 Miss. LEXIS 315, at *2-*3 (Miss. Aug. 5, 1993), *withdrawn on reh'g*, 636 So. 2d 658 (Miss. 1994). The court reversed the trial court's grant of summary judgment in favor of Garriga and rendered the case. *Garriga*, 1993 Miss. LEXIS 315, at *3.

¹² *Garriga*, 1993 Miss. LEXIS 315, at *17. The court upheld the validity of the provision offsetting coverage above the statutory minimum. *Id.* The holding barred Nationwide from reducing Garriga's coverage below \$20,000. *Id.*

¹³ *Garriga*, 636 So. 2d at 665. The court's holding hindered insurance companies' ability to limit their coverage through provisions written into policies. *Id.*

I. RELATED LAW

A. Introduction

Uninsured motorist law had no roots in common law; rather, it was a creature of statute.¹⁴ Legislatures enacted these statutes in response to the growing menace of uninsured drivers who left innocent, injured victims without compensation.¹⁵ Mississippi enacted its Uninsured Motorist Act in 1966.¹⁶ Every insurance policy issued under a typical uninsured motorist law must have met minimum coverage require-

¹⁴ Richard T. Phillips, *A Guide to Uninsured Motorist Insurance Law in Mississippi*, 52 MISS. L.J. 255, 257 (1982) [hereinafter Phillips, *Uninsured Motorist Insurance Law*]. Uninsured motorist laws generally grew out of "financial responsibility" laws, which required a motorist to show evidence that they were financially able to meet the demands of an accident after it happened. Richard T. Phillips, *Underinsured Motorist Coverage in Mississippi*, 3 MISS. C. L. REV. 65, 68 (1982) [hereinafter Phillips, *Underinsured Motorist Coverage*]. In 1925, Connecticut passed the first financial responsibility law. Phillips, *Underinsured Motorist Coverage, supra*, at 68. Mississippi followed suit in 1952. Motor Vehicle Safety-Responsibility Act, ch. 359, 1952 Miss. Laws 512 (codified as amended at MISS. CODE ANN. § 63-15-1 to -75 (1989)).

¹⁵ Mark Edwards, Note, *Uninsured Motorist Insurance, The Commercial Fleet Policy, and Harris v. Magee: A Modest Proposal For Change*, 61 MISS. L.J. 171, 171 (1991). The insurance industry lobbied to have uninsured motorist statutes enacted to avoid increased governmental regulation and control over insurance coverage. *Rampy v. State Farm Mut. Auto. Ins. Co.*, 278 So. 2d 428, 432 (Miss. 1973). The public policy behind such statutes was to protect those injured on the highways by uninsured motorists. *Rampy*, 278 So. 2d at 432.

¹⁶ Uninsured Motorist Act, ch. 524, 1966 Miss. Laws 978 (codified as amended at MISS. CODE ANN. § 83-11-101 to -111 (1991)). New Hampshire first enacted an uninsured motorist law in 1957, and every state subsequently enacted similar statutes. Phillips, *Uninsured Motorist Insurance Law, supra* note 14, at 258. Mississippi's version required that all automobile insurance policies cover death or injuries resulting from an accident which involved an uninsured motor vehicle. MISS. CODE ANN. § 83-11-101(1) (1991). The legislature later extended the coverage of uninsured motorist insurance to include property damage. Uninsured Motorist Act, ch. 432, § 1, 1979 Miss. Laws 761, 762 (codified as amended at MISS. CODE ANN. § 83-11-101(2) (1991)). The statute defined "uninsured motor vehicle" to include vehicles with no bodily injury insurance, vehicles with insurance in lesser amounts than provided by the injured parties' own uninsured motorist coverage and vehicles whose driver was unknown. MISS. CODE ANN. § 83-11-103(c) (1991). This section also incorporated underinsured motorists into the definition of uninsured motorists. Phillips, *Underinsured Motorist Coverage, supra* note 14, at 67.

ments.¹⁷ Courts did not enforce provisions which sought to diminish the minimum required coverage.¹⁸ In Mississippi, courts have consistently construed contracts of insurance for the benefit of the policyholder, not the insurance company.¹⁹

B. Aggregation, or "Stacking," of Coverages

Under this well-established principle, courts allowed aggregation of coverages, or "stacking," to facilitate full recovery of damages sustained by injured persons.²⁰ Stacking developed as a remedy to situations in which the statutory minimum did not suffice to cover the injuries that motorists sustained.²¹ Stacking allowed the insured to combine multiple coverages up to the amount of damages incurred or up to the aggregate policy limits.²² Insurance companies have attempt-

¹⁷ 8C JOHN A. APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 5069.35 (1981). If a policy excluded uninsured motorist coverage, the statutory provisions required the courts to incorporate coverage into the policy as if included in its terms. *Id.*

¹⁸ *Id.* Courts considered such provisions to be void as against public policy. *Lowery v. State Farm Mut. Auto. Ins. Co.*, 285 So. 2d 767, 770 (Miss. 1973).

¹⁹ *Williams v. Life Ins. Co.*, 367 So. 2d 922, 925 (Miss. 1979). The court has interpreted the Uninsured Motorist Act liberally to protect those injured by "financially irresponsible" drivers. Phillips, *Uninsured Motorist Insurance Law*, *supra* note 14, at 256; see also Edwards, *supra* note 15, at 172 n.6 (citing cases in support). The court also construed ambiguities in the policy language in favor of the insured. Phillips, *Uninsured Motorist Insurance Law*, *supra* note 14, at 261.

²⁰ Edwards, *supra* note 15, at 172. This doctrine was necessary to remedy the plight of persons who suffered a loss at the hands of a motorist through no fault of their own. *Id.* at 171. Uninsured motorist insurance filled the financial void left by the inadequate or total lack of available recovery from negligent drivers. Phillips, *Underinsured Motorist Coverage*, *supra* note 14, at 67.

²¹ Edwards, *supra* note 15, at 174. This policy arose out of the statutory language which required that the injured party collect all damages that their injuries warranted. MISS. CODE ANN. § 83-11-101(1) (1991). However, the amount of uninsured motorist coverage written could not exceed the liability coverage under the policy. *Id.* The required minimum coverage was originally \$5000 per person and \$10,000 per accident. Motor Vehicle Safety-Responsibility Act, ch. 359, § 5, 1952 Miss. Laws 512, 515-17 (codified as amended at MISS. CODE ANN. § 63-15-11 (1989)). The legislature increased the minimums to \$10,000 per person and \$20,000 per accident in 1972. Motor Vehicle Safety-Responsibility Law, ch. 349, § 2, 1972 Miss. Laws 375, 377-79 (codified as amended at MISS. CODE ANN. § 63-15-11 (1989)).

²² Edwards, *supra* note 15, at 174. Stacking could occur among separate poli-

ed to limit their exposure to stacking through various means but in Mississippi, nearly all have failed.²³

The first Mississippi case to allow stacking was *Harthcock v. State Farm Mutual Automobile Insurance Co.*²⁴ In *Harthcock*, a passenger on a motorcycle suffered injuries in a collision with an automobile.²⁵ Because the driver's policy did not cover the passenger's injuries, the court held that uninsured motorist coverage applied.²⁶ The court allowed the injured passenger to stack coverages under her personal policy

cies or within the same policy covering multiple vehicles. Julian T. Evans, III, Supreme Court Review, 50 MISS. L.J. 813, 823 (1979). The theory was that the insured who paid the premiums should be the party to receive any windfall. *Id.* at 825.

²³ John E. Wells, IV, Supreme Court Review, 55 MISS. L.J. 128, 132-33 (1985). The most common methods that insurance companies used to limit their exposure were such provisions as "limit of liability" and "other insurance" clauses. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 582 (Practitioner's Ed. 1988); see also ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST COVERAGE § 13.15 (2d Ed. 1992) (providing examples of typical limit of liability clauses). Mississippi courts have used three rules of construction to defeat coverage limitation clauses in policies: (1) liberally interpreting the Uninsured Motorist Act to facilitate recovery of damages; (2) resolving ambiguities in a policy for the benefit of the insured over the insurer; and (3) holding that statutes overrule contradictory policy provisions. Phillips, *Uninsured Motorist Insurance Law*, *supra* note 14, at 259-60. However, one type of policy provision which the Mississippi Supreme Court consistently allowed was the provision mandating reduction of coverage by amounts recovered from a negligent driver. *State Farm Mut. Auto. Ins. Co. v. Kuehling*, 475 So. 2d 1159, 1160 (Miss. 1985). The court held that insurers, through valid provisions in their policies, could reduce coverage by amounts recovered from the tortfeasor. *Kuehling*, 475 So. 2d at 1160. This holding affirmed an insurer's right to offset excess coverage with proceeds recovered from other drivers who were at fault. *Id.* at 1162-63; see also MISS. CODE ANN. § 83-11-107 (1991) (permitting subrogation of rights of policyholder for actions against parties at fault when claim paid). However, as with other policy provisions, such clauses could not reduce coverage below the minimum amount required by statute. *Kuehling*, 475 So. 2d at 1161.

²⁴ 248 So. 2d 456 (Miss. 1971).

²⁵ *Harthcock*, 248 So. 2d at 457. The subject of this case was the injured's attempt to recover uninsured motorist benefits under both her personal policy and the tortfeasor's policy. *Id.* at 457-58. The injured, Harthcock, originally sued her personal insurance carrier and the driver's carrier separately, but the trial court consolidated the cases. *Id.* at 458.

²⁶ *Id.* at 458-59. The motorcycle driver's policy did not cover passengers. *Id.* at 458. However, the policy which covered Harthcock's family automobile did provide coverage in this situation. *Id.* at 457.

and under the driver's policy.²⁷

The Mississippi Supreme Court subsequently clouded the issue in *Talbot v. State Farm Mutual Automobile Insurance Co.*²⁸ In *Talbot*, the court disallowed stacking of multiple coverages under one policy.²⁹ The court quickly sought to distance itself from the *Talbot* decision by drawing distinctions between the coverages involved.³⁰ However, in *Hartford Accident & Indemnity Co. v. Bridges*,³¹ the court allowed stacking of multiple coverages under a single policy, in conflict with *Talbot*.³²

²⁷ *Id.* at 461-62. The court found that the language of the Uninsured Motorist Act did not preclude such recovery. *Id.* at 462. Both policies contained identical "other insurance" clauses which reduced recovery under their policy if some other source was tapped. *Id.* at 461. However, only the provision in Harthcock's personal policy applied to the situation, because the driver's policy did not cover Harthcock in the first place. *Id.* The court held that the limiting provision in Harthcock's policy directly conflicted with the statute and therefore was unenforceable. *Harthcock*, 248 So. 2d at 462. This holding left both policies without limiting provisions to bar recovery by Harthcock. *Id.*

²⁸ 291 So. 2d 699 (Miss. 1974), *abandoned by* Government Employees Ins. Co. v. Brown, 446 So. 2d 1002 (Miss. 1984).

²⁹ *Talbot*, 291 So. 2d at 701. Talbot sustained injuries in a collision with an uninsured motorist, and he sought to stack coverage on his four vehicles which he had insured under one policy. *Id.* at 700. The court upheld the applicable "limit of liability" provision in the policy as "clear and unambiguous." *Id.* at 702. Therefore, the policy provisions only allowed the insured to recover the statutory minimum coverage. *Id.* at 701. The majority included a scant five justices. *Id.* at 703. In his dissent, Justice Broom chastised the court for its deviation from *Harthcock*. *Talbot*, 291 So. 2d at 703 (Broom, J., dissenting). The dissenting justices would have declared the limits of liability provision to be ambiguous and unclear and allowed stacking under the policy. *Id.* at 707 (Broom, J., dissenting).

³⁰ *Southern Farm Bureau Casualty Ins. Co. v. Roberts*, 323 So. 2d 536, 538 (Miss. 1975). Roberts collided with an uninsured motorist and sought to aggregate coverages under three separate policies issued by Farm Bureau. *Roberts*, 323 So. 2d at 536-37. The court distinguished *Talbot* on the basis that the coverage involved in *Roberts* was contained in separate policies. *Id.* at 538. Thus, the court allowed Roberts to stack the three policies. *Id.* at 539; *see also* *State Farm Mut. Auto. Ins. Co. v. Bishop*, 329 So. 2d 670, 672 (Miss. 1976) (allowing stacking of two separate policies without mentioning *Talbot*). *See generally* Janet B. Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Separate Policies Issued By Same Insurer to Same Insured*, 25 A.L.R.4TH 6, 12-18 (1983) (discussing decisions from various jurisdictions allowing stacking of separate policies).

³¹ 350 So. 2d 1379 (Miss. 1977).

³² *Bridges*, 350 So. 2d at 1381. The court justified the decision based on the

Courts continued to allow stacking in the context of multiple policies.³³ However, with the friction between the *Talbot* and *Bridges* decisions, questions remained as to coverage under a single policy.³⁴ In *Government Employees Insurance Co. v. Brown*,³⁵ the court settled the issue.³⁶

In *Brown*, the Mississippi Supreme Court clearly stated that insureds could stack uninsured motorist coverage under a single policy in two situations.³⁷ These situations applied when the applicable policy either collected separate premiums for multiple coverages or contained ambiguous provisions.³⁸ As different coverages and policies presented themselves, the

fact that the insured paid separate premiums. *Id.* In *Talbot*, the insured paid a single premium. *Id.* On this premise the court distinguished the two cases. *Id.* The unanimous court went on to say, "[i]n view of our later decisions, there is some doubt that *Talbot* was correctly decided." *Id.*

³³ *Pearthree v. Hartford Accident & Indem. Co.*, 373 So. 2d 267, 270 (Miss. 1979) [hereinafter *Pearthree I*] *aff'd in part and rev'd in part and remanded sub nom.* *United States Fidelity & Guar. Co. v. Pearthree*, 389 So. 2d 109, 110 (Miss. 1980) [hereinafter *Pearthree II*]. *Pearthree I* and *Pearthree II* allowed stacking of two separate policies issued by two insurance companies to two individuals. *Pearthree I*, 373 So. 2d at 270; *Pearthree II*, 389 So. 2d at 110; see Guy T. Gillespie, III, Supreme Court Review, 51 MISS. L.J. 505, 506 n.16 (1980-81) (discussing in detail ramifications of *Pearthree I* and *Pearthree II*).

³⁴ Wells, *supra* note 23, at 129. Federal courts were not consistent in their application of this unsettled area of Mississippi law. See *St. Arnaud v. Allstate Ins. Co.*, 501 F. Supp. 192, 194 (S.D. Miss. 1980) (allowing stacking of uninsured motorist coverage under single policy covering multiple vehicles). But see *Blansett v. American Employers Ins. Co.*, 652 F.2d 535, 537 (5th Cir. Unit A Aug. 1981) (rejecting stacking of single policy covering seven vehicles).

³⁵ 446 So. 2d 1002 (Miss. 1984).

³⁶ *Brown*, 446 So. 2d at 1006. The Fifth Circuit Court of Appeals certified this case for decision to the Mississippi Supreme Court. *Government Employees Ins. Co. v. Brown*, 675 F.2d 645, 646 (5th Cir. 1984).

³⁷ *Brown*, 446 So. 2d at 1006. The court held that where the insured paid separate premiums under one policy, the coverage was the same as coverage under multiple policies. *Id.* The court also warned insurers that any attempt to limit benefits for which the insured had paid premiums would not stand. *Id.* In so doing, the court expressly adopted Justice Broom's dissent in *Talbot*. *Id.*

³⁸ *Id.* The court held that the presence of either theory was sufficient to void any attempt to limit coverage through clauses in the policy. *Id.* See generally Janet B. Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Single Policy Applicable to Different Vehicles of Individual Insured*, 23 A.L.R.4TH 12, 18-24 (1983) (discussing split among jurisdictions over whether payment of separate premiums is determinative of stacking issue).

court continued to expand the application of stacking, thwarting efforts to limit its application.³⁹

C. Commercial Policies

Although the Mississippi Supreme Court had firmly established stacking in the context of personal coverages, the court had not extended stacking to commercial policies at this point.⁴⁰ In *Wickline v. United States Fidelity & Guaranty Co.*,⁴¹ the court built the necessary foundation to allow commercial stacking.⁴² The *Wickline* court scrutinized the treatment of different types of insureds under the Uninsured Motorist Act⁴³ and held that all types of insureds could stack coverage.⁴⁴ In reaching its decision, the court abandoned its

³⁹ *Brown v. Maryland Casualty Co.*, 521 So. 2d 854, 857 (Miss. 1987). The driver of another person's automobile died in an accident with an uninsured motorist. *Brown*, 521 So. 2d at 854. The decedent, who had permission to use the vehicle, was a "Class II" insured under the owner's policy. *Id.*; see MISS. CODE ANN. § 83-11-103(b) (1991) (defining classes of insureds). The court allowed the wrongful death beneficiaries of the Class II insured to stack the uninsured motorist coverages of the owner of the vehicle so as to recover full damages. *Brown*, 521 So. 2d at 857. In its decision the court adopted the rationale of the Montana Supreme Court. *Id.* at 856-57. The Montana court had previously allowed injured persons to recover under policies for which they had paid no premiums. *Sayers v. Safeco Ins. Co. of Am.*, 628 P.2d 659, 662 (Mont. 1981). The Montana court found that the determinative factor was whether coverage was in force, not who purchased the coverage. *Sayers*, 628 P.2d at 662; see also *State Farm Mut. Auto. Ins. Co. v. Nester*, 459 So. 2d 787, 793 (Miss. 1984) (allowing injured insured riding as passenger in own car to stack four personal uninsured motorist policies where driver was uninsured).

⁴⁰ *Ball v. USF&G*, 696 F. Supp. 1117, 1119-20 (N.D. Miss. 1988). In *Ball*, however, the Northern District of Mississippi interpreted Mississippi law to allow stacking of business coverage. *Ball*, 696 F. Supp. at 1122.

⁴¹ 530 So. 2d 708 (Miss. 1988).

⁴² *Edwards*, *supra* note 15, at 178. In *Wickline*, a passenger in an automobile died as a result of a collision with a parked car. *Wickline*, 530 So. 2d at 710. The decedent's wrongful death beneficiaries brought the action on her behalf. *Id.*

⁴³ *Wickline*, 530 So. 2d at 713-14. The statute created two classes of insureds. MISS. CODE ANN. § 83-11-103(b) (1991). Class I, applied to any person named in the policy or relatives of the insured who lived at the same residence as the insured. *Id.* Class II, included permissive users, guests, or personal representatives of the named insured. *Id.*

⁴⁴ *Wickline*, 530 So. 2d at 715. The court relied on *Bridges*, *Pearthree I* and *Brown v. Maryland Casualty Co.* as authority for its holding. *Id.*

emphasis on the question of whether the insured paid separate premiums.⁴⁵ Instead, the court shifted its focus to whether there was coverage in force.⁴⁶

The holding in *Wickline* opened the door for employees to seek stacked recovery under commercial insurance policies.⁴⁷ Approximately nine months later in *Cossitt v. Nationwide Mutual Insurance Co.*,⁴⁸ the court permitted recovery of stacked benefits under a commercial uninsured motorist policy covering three vehicles.⁴⁹ The court allowed stacking of business policies⁵⁰ primarily because it had already extended stacking to Class II insureds claiming under personal policies.⁵¹ However, the court reserved judgment on whether to allow stacking of large "fleet" coverages.⁵²

⁴⁵ *Id.* at 714. Ms. Wickline had not paid any premiums on the automobile in question. *Id.*

⁴⁶ *Id.* The owner of the automobile had purchased a policy which covered anyone present in one of the insured vehicles. *Id.* The court reasoned that the denial of coverage would give the insurance company a way out of liability, something the Act sought to prevent. *Id.* at 714-15.

⁴⁷ See Edwards, *supra* note 15, at 174-78 (discussing effect of *Wickline* on stacking commercial policies).

⁴⁸ 551 So. 2d 879 (Miss. 1989).

⁴⁹ *Cossitt*, 551 So. 2d at 884. The first case from the Mississippi Supreme Court allowing commercial stacking did not involve an employment relationship. *Id.* at 881. Instead, the case involved an accident in which an underinsured motorist struck three persons disembarking from a church bus. *Id.* Two of the passengers sustained injuries; one died. *Id.* The church had uninsured motorist coverage in the amount of \$25,000 per vehicle. *Id.* at 880. The injured persons were all Class II insureds. *Cossitt*, 551 So. 2d at 884.

⁵⁰ *Id.* The court cited numerous cases which came to the opposite conclusion. *Id.* However, the court instead chose to follow the Minnesota Supreme Court, which allowed stacking on a commercial policy of seven vehicles. *Id.* (citing *Yeager v. Auto-Owners Ins. Co.*, 335 N.W.2d 733, 739 (Minn. 1983)); see also *Curry v. Travelers Indem. Co.*, 728 F. Supp. 1299, 1304 (S.D. Miss. 1989) (allowing stacking under commercial policy covering three vehicles); *Pride v. General Agents Ins. Co. of Am.*, 697 F. Supp. 1417, 1423 (N.D. Miss. 1988) (allowing stacking of commercial policy covering eight vehicles).

⁵¹ *Cossitt*, 551 So. 2d at 884. Nationwide admitted that its policy covered the injured parties and instead based its argument on the theory that only Class I insureds could stack business coverage. *Id.*

⁵² *Id.* The court sought to limit its holding to business policies which were not "large, commercial fleet" policies. *Id.* The court took refuge in the fact that many personal policies also covered multiple vehicles. *Id.* Thus, the court believed that

One year later, in *Harris v. Magee*,⁵³ the court extended stacking to all types of commercial uninsured motorist coverage.⁵⁴ In *Harris*, an uninsured motorist struck an employee as he repaired a crane on the shoulder of a highway.⁵⁵ The employee's wrongful death beneficiaries sought to recover stacked benefits on his employer's policy.⁵⁶ The court reiterated the rule which permitted stacking of uninsured motorist coverage for all classes of insureds.⁵⁷ In spite of voluminous authority to the contrary,⁵⁸ the court allowed stacking of cov-

its holding would not impose a high cost burden on insurance companies. *Id.*; see *Yeager v. Auto-Owners Ins. Co.*, 335 N.W.2d 733, 739 (Minn. 1983) (dismissing argument that allowing stacking of uninsured motorist coverage under commercial policies would prejudice insurers).

⁵³ 573 So. 2d 646 (Miss. 1990).

⁵⁴ Edwards, *supra* note 15, at 179. Previously, in *Cossitt*, the court had warned that it possibly would not extend stacking to business fleet coverage. *Id.* at 178.

⁵⁵ *Harris*, 573 So. 2d at 648. The employee, Magee, died as a result of the accident. *Id.*

⁵⁶ *Id.* at 647. Because the decedent drove a company truck to the site to assist in the repair effort, the court determined that the decedent had used the truck sufficiently to qualify under his employer's insurance coverage. *Id.* at 651.

⁵⁷ *Id.* at 652. The court called stacking a "positive gloss" on Mississippi's uninsured motorist statute. *Id.* at 653 (quoting *Wickline v. USF&G*, 530 So. 2d 708, 714 (Miss. 1988)). The court noted that it had repeatedly allowed Class II insureds to stack coverage. *Id.* at 654. Employees were generally Class II insureds. *Id.* Therefore, the court held it could not differentiate types of coverage where the legislature had not. *Harris*, 573 So. 2d at 655.

⁵⁸ *Id.* at 652-53. The court acknowledged the large amount of contrary authority from around the country and said:

In making this determination we have considered the following:

1. We are guided by our uninsured motorist statute, not the jurisprudence of foreign jurisdictions;

2. Throughout our jurisprudence and in the liberal rules of construction which we have compiled in interpreting our [uninsured motorist] statute, we have consistently recognized and allowed a Class II insured to stack uninsured motorist coverage;

3. Most importantly, our legislature has not seen fit to distinguish a "commercial fleet" policy from any other auto policy. Stacking is a vital cog in our [uninsured motorist] scheme. The legislature has not statutorily overruled our stacking decisions; therefore, we assume that stacking is not repugnant to Mississippi public policy.

Id. at 653; see also Edwards, *supra* note 15, at 181 n.57 (citing authority from other states disallowing stacking of commercial uninsured motorist coverage). See

erage on all twenty-two vehicles.⁵⁹

D. *The Assault on the Statutory Minimum*

Prior to *Cossitt*, insureds who desired to stack uninsured motorist benefits had sought to stack only the statutory minimum coverage, \$10,000.⁶⁰ However, in *Cossitt*, the court allowed stacking of excess uninsured motorist coverage⁶¹ for the first time, without ruling on the issue.⁶² Subsequently, the court had another opportunity to explicitly allow stacking of coverage in excess of the statutory minimum.⁶³ However, the court did not reach a decision on the issue.⁶⁴

generally Janet B. Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Fleet Policy*, 25 A.L.R.4TH 896, 906-13 (1983) (discussing cases from various jurisdictions that disallow stacking of commercial policies on behalf of employees).

⁵⁹ *Harris*, 573 So. 2d at 655. The court invited the legislature to amend the Uninsured Motorist Act if it disagreed with the court's holding. *Id.*

⁶⁰ *Land v. USF&G*, 861 F. Supp. 544, 547 n.2 (S.D. Miss. 1994). In fact, the only case from the Mississippi Supreme Court which had previously allowed stacking of coverage in excess of the statutory minimum under the Uninsured Motorist Act was *Cossitt*. See *Cossitt v. Nationwide Mut. Ins. Co.*, 551 So. 2d 879, 884 (Miss. 1989) (allowing stacking of three policies to provide coverage totaling \$75,000); see also MISS. CODE ANN. § 63-15-11 (1989) (requiring that insurance contracts provide minimum of \$10,000 per person and \$20,000 per accident of uninsured motorist coverage).

⁶¹ See MISS. CODE ANN. § 83-11-111 (1991) (permitting excess uninsured motorist coverage). The statute also allowed insurers and insureds to contract for coverage in excess of the statutory minimum. *Id.* However, the amount of excess coverage could not exceed the amount of liability coverage provided in the policy. *Id.* § 83-11-101(1).

⁶² *Cossitt*, 551 So. 2d at 884. The question before the court in *Cossitt* was whether coverage under a commercial policy could be stacked. *Id.* The court did not mention the issue of stacking excess coverage. *Id.* However, the court awarded the victims stacked coverage which exceeded the statutory minimum per policy. *Id.*

⁶³ *Harris*, 573 So. 2d at 657. The decedent's beneficiaries had argued that the policy in question provided uninsured motorist coverage in the amount of \$25,000 per vehicle. *Id.* at 656.

⁶⁴ *Id.* at 657. The insurer canceled the previous policies which provided for coverage in excess of \$10,000 and placed the insured in an assigned risk pool which did not provide uninsured motorist coverage. *Id.* at 656. The court held that the insurer rightfully canceled the previous policy; therefore, the only uninsured motorist coverage that was in force was the minimum amount. *Id.* at 657.

Finally, in *Casualty Reciprocal Exchange v. Federal Insurance Co.*,⁶⁵ the Mississippi Supreme Court confronted the statutory minimum.⁶⁶ The issue facing the court was whether an unambiguous policy provision could preclude stacking above the minimum required under the Uninsured Motorist Act.⁶⁷ The court held that parties could freely contract for coverage in excess of the statutory minimum.⁶⁸ Thus, the court allowed insurance companies to limit their coverage through provisions in the policy.⁶⁹

In a spirited dissent, four justices argued that the majority had misconstrued the minimum under the Uninsured Motorist Act.⁷⁰ The justices believed that the minimum was the

⁶⁵ 608 So. 2d 1258 (Miss. 1992).

⁶⁶ *Casualty Reciprocal Exch.*, 608 So. 2d at 1259. The Southern District of Mississippi had already interpreted the definition of the statutory minimum. *Porter v. Shelter Gen. Ins. Co.*, 678 F. Supp. 151, 152 (S.D. Miss. 1988), criticized by *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 665 (Miss. 1994) (describing *Erie* guess made by *Porter* court as "wrong"). In *Porter*, the court held that insurance policies could validly reduce excess uninsured motorist coverage through a "limit of liability" provision which allowed an offset for workers' compensation benefits received by the insured. *Porter*, 678 F. Supp. at 153. The minimum amount was simply the amount set forth in the Motor Vehicle Safety-Responsibility Act. *Id.* at 152.

⁶⁷ *Casualty Reciprocal Exch.*, 608 So. 2d at 1259. The Circuit Court of Washington County allowed the insured to stack the total coverages under five policies, which totaled \$1,250,000. *Id.*

⁶⁸ *Id.* at 1263. Although the insurer charged separate premiums for each of the five coverages, the court stated that payment of separate premiums did not entitle the insured to stack coverages. *Id.* at 1264. Instead, the court held that the ambiguity of the clauses limiting liability enabled the insured to stack coverage. *Id.* The court reasoned that Mississippi's positive law only required stacking in the amount of \$50,000. *Id.* Each contract provided for coverage up to \$250,000, and the insurer admitted liability for that amount. *Casualty Reciprocal Exch.*, 608 So. 2d at 1264. Therefore, the court disallowed stacking. *Id.*

⁶⁹ *Id.* at 1262. The court held that the "limit of liability" clause in the policy was unambiguous and clear, and the court upheld the provision. *Id.*

⁷⁰ *Id.* at 1271 (Banks, J., dissenting). There were actually three separate written dissents to *Casualty Reciprocal Exchange*. *Id.* at 1264. The most important was the dissent written by Justice Banks which was joined by Presiding Justice Dan M. Lee and Justices Sullivan and McRae. *Id.* at 1271 (Banks, J., dissenting). In another dissent, Justice McRae, joined by Justices Sullivan and Banks, criticized the majority opinion for refusing to follow precedent. *Id.* at 1274 (McRae, J., dissenting). Justice McRae worried that the majority's holding would further limit the availability of insurance, especially since insureds possessed little real

amount for which the parties had contracted as long as it was not less than the amount required by the statute.⁷¹ The dissent interpreted the statutory language as giving the insured the option to raise the statutory minimum through an agreement for coverage in excess of the required amount.⁷²

In the first *Garriga* opinion, the court followed the rationale of *Casualty Reciprocal Exchange* and held that insurers could limit supplemental uninsured motorist insurance through unambiguous language in the policy.⁷³ The court upheld a "limit of liability" clause which required an offset for benefits received by the insured under a workers' compensation plan.⁷⁴ The dissent⁷⁵ reiterated its argument in *Casualty Reciprocal Exchange* that the court had misconstrued the statutory minimum.⁷⁶

bargaining power. *Id.* (McRae, J., dissenting).

⁷¹ *Id.* at 1271 (Banks, J., dissenting). As a basis for his dissent, Justice Banks relied on language in the Uninsured Motorist Act, which allowed uninsured motorist coverage in excess of the minimum requirements. *Id.* (Banks, J., dissenting). Under the Act, insureds could opt to increase their "uninsured motorist limits" up to the liability limits under the policy, or any other "limit" which the insured desired. MISS. CODE ANN. § 83-11-101(1) (1991). Justice Banks reasoned that it was this language which allowed the insured to set the amount of coverage. *Casualty Reciprocal Exch.*, 608 So. 2d at 1271 (Banks, J., dissenting). The amounts delineated in the Uninsured Motorist Act only defined the absolute minimum of coverage, not the statutory limits. *Id.* at 1272 (Banks, J., dissenting).

⁷² *Casualty Reciprocal Exch.*, 608 So. 2d at 1271 (Banks, J., dissenting). This interpretation of the statute definitely followed the court's policy to "liberally construe" the Uninsured Motorist Act. *Id.* at 1272 (Banks, J., dissenting).

⁷³ *Nationwide Mut. Ins. Co. v. Garriga*, No. 90-CA-0493, 1993 Miss. LEXIS 315, at *11-14 (Miss. Aug. 5, 1993), *withdrawn on reh'g*, 636 So. 2d 658 (Miss. 1994). The court stated that it was the long-standing policy of the court to allow parties to contract for coverage as they wished, as long as their agreement did not infringe upon the statutory minimum. *Garriga*, 1993 Miss. LEXIS 315, at *12.

⁷⁴ *Garriga*, 1993 Miss. LEXIS 315, at *17. The effect of this clause was to reduce the amount of recovery *Garriga* could receive on his two insurance policies by amounts paid by his workers' compensation carrier. *Id.* However, the offset provision could not reduce coverage below the required amount, \$20,000. *Id.*

⁷⁵ *Id.* Justices McRae, Banks, and Sullivan, who dissented in *Casualty Reciprocal Exchange*, also dissented in the first *Garriga* opinion. *Id.* The fourth dissenting justice, Roberts, was not a member of the court at the time of the *Casualty Reciprocal Exchange* decision. THE AMERICAN BENCH 1348 (Marie T. Finn et al. eds., 1993).

⁷⁶ *Garriga*, 1993 Miss. LEXIS 315, at *22 (Banks, J., dissenting). Justice

II. *NATIONWIDE MUTUAL INSURANCE CO. V. GARRIGA*A. *Opinion of the Court*

Less than seven months after initially hearing the case, the Mississippi Supreme Court granted a Petition for Rehearing.⁷⁷ The court set out the fundamental principles necessary to the analysis of insurance agreements.⁷⁸ Next, the court overturned the trial judge's holding that the language in the insurance contract was "ambiguous and unclear."⁷⁹ Turning to public policy grounds, the court stated that it would not enforce a contract contrary to public policy.⁸⁰ The court reiterated that insureds were free to contract as they wished for uninsured motorist coverage in excess of the statutory requirements.⁸¹ However, the court observed that their previous interpretation of the "statutory minimum" was in error.⁸²

Banks' dissent formed the basis for the second majority opinion, which he authored. *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 659 (Miss. 1994).

⁷⁷ *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 659 (Miss. 1994). Originally, the case came to the court as an appeal of a grant of summary judgment in favor of Garriga. *Garriga*, 636 So. 2d at 660. The court's standard of review required it to view the evidence in the record most favorably for the petitioner, who had opposed the motion in the trial court. *Id.* at 661. However, the court also determined that it made a *de novo* review of the record. *Id.*

⁷⁸ *Garriga*, 636 So. 2d at 662. The court stated that courts in Mississippi have long interpreted insurance policies for the benefit of the insured. *Id.* Decisions consistently resolved ambiguities in coverage provisions so that the policy covered the insured's losses from the occurrence. *Id.*

⁷⁹ *Id.* The trial judge determined that the workers' compensation offset provision, when reconciled with the declarations in the policy, rendered the contract unclear and ambiguous. *Id.* The court did not share this view and reversed. *Id.*

⁸⁰ *Id.* The court stated that this rule applied in all situations involving contracts, no matter how explicit the terms. *Id.* The court reiterated that insured drivers in Mississippi who have purchased coverage should recover the full amount for which they have paid. *Id.* The only allowable limitation on recovery of uninsured motorist insurance was the amount of damages incurred or the coverage limits in the policy. *Id.*

⁸¹ *Id.* at 663. Previous decisions uniformly upheld the ability of insurers and insureds to contract for coverage above the statutory minimums. *Id.* The court reiterated that, as long as the policy did not violate the minimums and maximums, then the parties could contract for coverage as they wished. *Id.*

⁸² *Id.* In reference to the majority in *Casualty Reciprocal Exchange*, the court commented that they had previously confused the issue of "excess" versus "minimum" coverage. *Id.* at 664.

Under the Uninsured Motorist Act, the court concluded that the minimum amount of uninsured motorist coverage was the amount for which the insured contracted.⁸³ The court came to this conclusion as a result of a 1979 amendment to the Uninsured Motorist Act.⁸⁴ The court reasoned that this amendment brought the area of excess coverage within the purview of "the statutory scheme."⁸⁵ Therefore, it was no longer governed by contractual provisions.⁸⁶ Thus, the court held that insurance companies could not attempt to reduce excess uninsured motorist coverage through limitation provisions in their policies.⁸⁷

B. Dissenting Opinion

Justices Roberts and Smith joined Justice Pittman's dissent.⁸⁸ The dissenting justices maintained that the majority misconstrued the intent of the drafters of the uninsured motorist statutes.⁸⁹ Instead, the dissenters argued that the

⁸³ *Garriga*, 636 So. 2d at 664. The court effectively destroyed the ability of insurance companies to limit their liability through provisions such as those that offset coverage with proceeds from workers' compensation plans. *Id.*

⁸⁴ *Id.* The 1979 amendment added a phrase to the excess coverage provision of the Act that read: "except as otherwise provided in this article." Uninsured Motorist Act, ch. 429, § 3, 1979 Miss. Laws 758, 760 (codified as amended at MISS. CODE ANN. § 83-11-111 (1991)). The court reasoned that the placement of this phrase subjected excess coverage to the language in section 83-11-101(1) of the Mississippi Code, which established the minimum limit on coverage. *Garriga*, 636 So. 2d at 664-65.

⁸⁵ *Garriga*, 636 So. 2d at 665. Previously, the court construed the Uninsured Motorist statutes to simply allow excess coverage, not to control it. *Id.* at 663.

⁸⁶ *Id.* at 665. By using this language, the court referred to the ability of the parties to freely contract with one another, which the court effectively destroyed. *Id.*

⁸⁷ *Id.* In addition to the holding, the court expressly overruled *Casualty Reciprocal Exchange*. *Id.* at 659-60. The court noted, however, that the only error in *Casualty Reciprocal Exchange* was the court's interpretation of the minimum. *Id.* at 663.

⁸⁸ *Id.* at 665 (Pittman, J., dissenting). The dissent argued that *Casualty Reciprocal Exchange* was "well-reasoned." *Id.* (Pittman, J., dissenting).

⁸⁹ *Id.* at 666 (Pittman, J., dissenting). Justice Pittman believed that the legislature's only intent was to set the minimum amount of required coverage. *Id.* (Pittman, J., dissenting). The parties could go further if they so desired. *Id.* (Pittman, J., dissenting).

court had consistently interpreted the statutory minimum correctly.⁹⁰ Justice Pittman further stated that the majority's action represented an unwarranted infringement on the freedom of contract.⁹¹ Therefore, the dissenting justices would have upheld the offset clause for all amounts of excess coverage.⁹²

III. DISCUSSION

*Nationwide Mutual Insurance Co. v. Garriga*⁹³ represented a major step in a long line of decisions of the Mississippi Supreme Court which have expanded the availability of recovery under uninsured motorist insurance.⁹⁴ Justice Broom's dissent in *Talbot*⁹⁵ signaled the beginning of the court's liberalization of its interpretation of the Act.⁹⁶ However, the court's latest expansion of recovery may have negative repercussions for Mississippians.

⁹⁰ *Garriga*, 636 So. 2d at 665 (Pittman, J., dissenting). The dissenting justices quoted extensively from the *Casualty Reciprocal Exchange* opinion. *Id.* at 665-66 (Pittman, J., dissenting). They reiterated the theory that the Act solely allowed insureds to obtain excess coverage. *Id.* at 666 (Pittman, J., dissenting).

⁹¹ *Id.* (Pittman, J., dissenting). Justice Pittman argued that the freedom to contract for excess insurance coverage was as important a public policy as limitation of the uninsured motorist threat. *Id.* at 665 (Pittman, J., dissenting).

⁹² *Id.* at 666 (Pittman, J., dissenting). The dissenting justices did not attempt to limit Garriga's right to stack coverages; rather, they upheld his ability to do so. *Id.* (Pittman, J., dissenting).

⁹³ 636 So. 2d 658 (Miss. 1994).

⁹⁴ See *supra* notes 39, 44, 49 and accompanying text.

⁹⁵ See *supra* note 29 and accompanying text.

⁹⁶ See *supra* note 37 and accompanying text.

A. Legal Repercussions

The obvious response to the decision is legislative action.⁹⁷ However, the legislature has failed to slow the court's steady expansion of uninsured motorist coverage.⁹⁸ The court has always held, however, that it was the intent of the legislature to liberally construe the Uninsured Motorist Act.⁹⁹ That was the exact course taken in *Garriga*.¹⁰⁰

How far the court might venture in its expansion of recovery under the Uninsured Motorist Act is unclear. For instance, the court could enlarge the ability of passengers to stack other persons' coverage with their own to increase recovery.¹⁰¹ However, the court has failed to expand recovery under uninsured motorist coverage in recent cases,¹⁰² and the court may have reached its limit.

B. Practical Repercussions

The practical ramifications may be more important and detrimental than the legal repercussions. The court's decision exposed insurance companies to substantially more risk on their coverages currently in force.¹⁰³ This increased risk will probably translate into higher premiums.¹⁰⁴ Also, insurers might refuse to write uninsured motorist coverage in substan-

⁹⁷ *Casualty Reciprocal Exch. v. Federal Ins. Co.*, 608 So. 2d 1258, 1274 (Miss. 1992) (McRae, J., dissenting). Justice McRae argued that any restriction on benefits contracted for was properly left to the legislature. *Casualty Reciprocal Exch.*, 608 So. 2d at 1274 (McRae, J., dissenting). It follows that any expansion of benefits not contemplated by the parties in their contract would also be within the province of the legislature. See *supra* notes 57-59 and accompanying text.

⁹⁸ See *supra* note 58 and accompanying text.

⁹⁹ See *supra* notes 19, 58 and accompanying text.

¹⁰⁰ See *supra* notes 72, 75, 76 and accompanying text.

¹⁰¹ See *supra* notes 25, 33 and accompanying text.

¹⁰² See *Meadows v. Mississippi Farm Bureau Ins. Co.*, 634 So. 2d 108, 111 (Miss. 1994) (refusing to extend stacking privileges to Class II insured where insured not covered under all policies sought to be stacked); *Miller v. Allstate Ins. Co.*, 631 So. 2d 789, 791 (Miss. 1994) (disallowing recovery under uninsured motorist coverage to injured passenger where policy clearly prohibited recovery).

¹⁰³ See *supra* note 54 and accompanying text.

¹⁰⁴ See *supra* note 70 and accompanying text.

tial amounts.¹⁰⁵ Finally, as a prerequisite for writing coverage on multiple vehicles, insurance companies might require that insureds waive uninsured motorist coverage on policies covering multiple vehicles.¹⁰⁶ The cumulative effect of these possibilities is to reduce the amount and quality of uninsured motorist coverage available in this state.

IV. CONCLUSION

The Mississippi Supreme Court has consistently facilitated recovery by injured persons. The court has allowed increased recovery mainly by augmenting coverage under the Uninsured Motorist Act. In *Nationwide Mutual Insurance Co. v. Garriga*,¹⁰⁷ the court moved toward increasing the potential for recovery by aggressively interpreting the language of Mississippi's Uninsured Motorist Act. The legislature will probably allow the holding to stand, in spite of inevitable pressure from the insurance industry, leaving Mississippians with higher premiums on automobile insurance and lower levels of available coverage.

J. Thomas Longino, IV

¹⁰⁵ *Casualty Reciprocal Exch.*, 608 So. 2d at 1274 (McRae, J., dissenting). Justice McRae noted that insurance companies in Mississippi already refused to sell liability policies in excess of \$500,000. *Id.* (McRae, J., dissenting). The effect, therefore, would be to require the insured to go without substantial uninsured motorist coverage on subsequent policies. *Id.* (McRae, J., dissenting); see also *supra* note 70 and accompanying text.

¹⁰⁶ *Casualty Reciprocal Exch.*, 608 So. 2d at 1274 (McRae, J., dissenting). Although the court maintained that insurance companies and their clients have freedom to contract, in practice, insurers enjoy a strong position from which to bargain. See *supra* note 70 and accompanying text.

¹⁰⁷ 636 So. 2d 658 (Miss. 1994).

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